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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

| | | |
|---|---|-------------------------------------|
| UNITED STATES OF AMERICA, |) | No. 2:19-cv-02142-WBS-EFB |
| |) | |
| Plaintiff, |) | |
| |) | PLAINTIFF UNITED STATES OF |
| v. |) | AMERICA'S NOTICE OF MOTION, |
| |) | MOTION FOR SUMMARY JUDGMENT, |
| |) | AND BRIEF IN SUPPORT THEREOF |
| THE STATE OF CALIFORNIA; GAVIN |) | |
| C. NEWSOM, in his official capacity as |) | |
| Governor of the State of California; THE |) | |
| CALIFORNIA AIR RESOURCES BOARD; |) | |
| MARY D. NICHOLS, in her official |) | |
| capacities as Chair of the California Air |) | |
| Resources Board and as Vice Chair and a |) | |
| board member of the Western Climate |) | |
| Initiative, Inc.; WESTERN |) | |
| CLIMATE INITIATIVE, INC.; JARED |) | Date: January 13, 2020 |
| BLUMENFELD, in his official capacities as |) | Time: 1:30 p.m. |
| Secretary for Environmental Protection and as |) | Courtroom: 5 (14th Floor) |
| a board member of the Western Climate |) | Judge: Hon. William B. Shubb |
| Initiative, Inc.; KIP LIPPER, in his official |) | |
| capacity as a board member of the Western |) | |
| Climate Initiative, Inc., and RICHARD |) | |
| BLOOM, in his official capacity as a board |) | |
| member of the Western Climate Initiative, |) | |
| Inc., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

NOTICE OF MOTION

PLEASE TAKE NOTICE that on Monday, January 13, 2020, or as soon thereafter as the matter may be heard in Courtroom 5 of the above-entitled Court (Hon. William B. Shubb presiding), located at 501 “I” Street, Sacramento, California 95814, Plaintiff United States of America (the “United States”) will move for summary judgment, as set forth below.

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 260(a), “a party [may] move for summary judgment at any time, *even as early as the commencement of the action.*” Fed. R. Civ. P. 56 (Advisory Committee Notes to 2009 Amendment) (emphasis added). Because there is no genuine dispute as to any material fact related to the claims on which the United States moves, and it is entitled to judgment as a matter of law, the United States hereby expeditiously seeks summary judgment against all Defendants. This motion is based on the following brief, on the supporting evidence filed concurrently herewith, on the arguments of counsel that may be made at any hearing on this matter, and on all relevant documents on file in this action.

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| <i>B. Altman & Co. v. United States</i> , 224 U.S. 583 (1912)..... | 16 |
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| <i>City of Milwaukee v. Illinois</i> , 451 U.S. 304, (1981)..... | 26 |
| <i>Crosby v. National Foreign Trade Council</i> , 530 U.S. 363 (2000)..... | 3, 21, 22 |
| <i>Dames & Moore v. Regan</i> , 453 U. S. 654 (1981)..... | 22 |
| <i>Electric Cooperative Corp. v. Arkansas Public Service Commission</i> , 461 U.S. 375, (1982)..... | 27 |
| <i>Garcia v. Texas</i> , 564 U.S. 940 (2011)..... | 17 |
| <i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)..... | 2, 22, 26, 27 |
| <i>International Paper Co. v. Ouellette</i> , 479 U.S. 481 (1986)..... | 25 |
| <i>Ludecke v. Watkins</i> , 335 U.S. 160 (1948)..... | 1, 16 |
| <i>Made in the USA Found. v. United States</i> , 242 F.3d 1300 (11th Cir. 2001)..... | 14, 15, 16 |
| <i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007)..... | 1, 14 |
| <i>Movsesian v. Victoria Versicherung AG</i> , 670 F.3d 1067 (9th Cir. 2012)..... | 2 |

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| 1 | <i>NLRB v. Noel Canning</i> , | |
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| 3 | <i>Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System</i> , | |
| 4 | 472 U.S. 159 (1985) | 24 |
| 5 | <i>Swoger v. Rare Coin Wholesalers</i> , | |
| 6 | 803 F.3d 104 (9th Cir. 2015) | 3 |
| 7 | <i>United States Steel Corp. v. Multistate Tax Comm’n</i> , | |
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| 15 | <i>Youngstown Sheet & Tube Co. v. Sawyer</i> , | |
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| 24 | Art. VI, § 2, cl 2 | 10 |
| 25 | | |
| 26 | Statutes | |
| 27 | 33 U.S.C. § 535a | 23 |
| 28 | 72 Stat. 1701 | 23 |
| | Act of Jul. 24, 1968, Pub. L. No. 90-419, 82 Stat. 414 | 23 |
| | Act of Jun. 25, 1949, ch. 246, 63 Stat. 271, 272 | 22 |
| | Act of Sept. 2, 1958, Pub. L. No. 85-877, § 1 | 23 |
| | CAL. HEALTH & SAFETY CODE § 38564 | 5, 18 |
| | S.J. Res. 13, 110 th Cong., Pub. L. No. 110-171, 121 Stat. 2467 (2007) | 23 |

Regulations

| | |
|---|---------|
| 17 Cal. Code Regs. § 95811, 95812, 95820, 95820(c), 95890, 95922, 95970(a)(1) | 7 |
| 17 Cal. Code Regs. § 95940..... | 5, 18 |
| 17 Cal. Code Regs. § 95943..... | 18 |
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| 17 Cal. Code Regs. §§ 95801-96022 | 4, 5, 7 |
| 17 Cal. Code Regs. §§ 95850-95858 | 7 |
| 17 Cal. Code Regs. §§ 95910-95915 | 7 |
| 17 Cal. Code Regs. §§ 95920-95922 | 7 |
| 82 Fed. Reg. 16093 (Mar. 28, 2017)..... | 11 |
| 82 Fed. Reg. 16096 (Mar. 28, 2017)..... | 11 |

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| Fed. R. Civ. P. 56(a) Advisory Committee Notes to 2009 Amendment..... | iii, 13 |
| Local Rule 260(a)..... | ii |

Federal Documents

| | |
|--|----------|
| Michael R. Pompeo, Press Statement, On the U.S. Withdrawal from the Paris Agreement, <i>available at</i> https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/ (last visited Dec. 11, 2019) | 27 |
| Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783..... | 11 |
| S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) | 10 |
| Statement by President Trump on the Paris Climate Accord, Jun. 1, 2017, <i>available at</i> https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/ (last visited Dec. 11, 2019) | 1, 2, 12 |
| The Great Lakes Basin Compact: Hearing on S. 2688 Before the Subcomm. on the Great Lakes Basin of the S. Comm. on Foreign Relations, 84th Cong. 14 (1956)..... | 23 |

Periodicals

| | |
|--|--|
| Adam Tanner, Schwarzenegger: California is ‘Nation State’ Leading World, Washington Post (Jan. 9, 2007), <i>available at</i> http://www.washingtonpost.com/wp- | |
|--|--|

| | | |
|----|---|--------|
| 1 | dyn/content/article/2007/01/09/AR2007010901427.html (last visited Dec. 11, 2019) ... | 5, |
| 2 | 20 | |
| 3 | Douglas A. Kysar & Bernadette A. Meyler, <i>Like a Nation State</i> , 55 U.C.L.A. L. REV. 1621 | |
| 4 | (2008) | 5, 20 |
| 5 | Duncan B. Hollis, <i>Elusive Foreign Compact, The</i> , 73 Mo. L. Rev. 1071 (Fall 2008) | 22 |
| 6 | Javier C. Hernández & Chris Buckley, Xi Jinping and Jerry Brown of California Meet to | |
| 7 | Discuss Climate Change, N.Y. Times (June 6, 2017), <i>available at</i> | |
| 8 | https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown- | |
| 9 | california-climate.html (last visited Dec. 11, 2019) | 21 |
| 10 | | |
| 11 | Other Materials | |
| 12 | | |
| 13 | Agreement on the Harmonization and Integration of Cap-and-Trade Programs for | |
| 14 | Reducing Greenhouse Gas Emissions available at | |
| 15 | https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf | |
| 16 | (last visited Dec. 11, 2019) | passim |
| 17 | Archived – Cap and trade, <i>available at</i> https://www.ontario.ca/page/cap-and-trade (last | |
| 18 | visited Dec. 11, 2019) | 7 |
| 19 | California Cap-and-Trade Program, Cap-and-Trade Auctions and Reserve Sales Financial | |
| 20 | Services Administration (Aug. 24, 2018), <i>available at</i> https://ww3.arb.ca.gov/cc/ | |
| 21 | capandtrade/auction/forms/financial_services_administration_faq.pdf (last visited Dec. | |
| 22 | 11, 2019) | 9 |
| 23 | California Cap-and-Trade Program, Summary of Proceeds to California and Consigning | |
| 24 | Entities, <i>available at</i> https://ww3.arb.ca.gov/cc/capandtrade/auction/ | |
| 25 | proceeds_summary.pdf (last visited Dec. 11, 2019) | 8 |
| 26 | California Tropical Forest Standard: Criteria for Assessing Jurisdiction-Scale Programs | |
| 27 | that Reduce Emissions from Tropical Deforestation, <i>available at</i> | |
| 28 | https://ww3.arb.ca.gov/cc/ghgsectors/tropicalforests/ca | |
| | _tropical_forest_standard_english.pdf (last visited Dec. 11, 2019) | 5 |
| | CARB, Auction Notices and Reports, <i>available at</i> https://ww3.arb.ca.gov/cc/ | |
| | capandtrade/auction/auction_notices_and_reports.htm (last visited Dec. 11, 2019) | 8 |
| | CARB, Chapter 5: How Do I Buy, Sell, and Trade Compliance Instruments?, <i>available</i> | |
| | <i>at</i> https://ww3.arb.ca.gov/cc/capandtrade/guidance/chapter5.pdf (last visited Dec. 10, | |
| | 2019) | 9 |
| | CARB, Detailed Auction Requirements and Instructions, <i>available at</i> | |
| | https://ww3.arb.ca.gov/cc/capandtrade/auction/auction_requirements.pdf at pt. IX, p. 43 | |
| | (last visited Dec. 11, 2019) | 9 |
| | CARB, Final Environmental Analysis for the Strategy for Achieving California’s 2030 | |
| | Greenhouse Gas Target (Nov. 30, 2017) (2017 AB 32 Scoping Plan, Attachment A: | |
| | Environmental and Regulatory Setting), <i>available at</i> https://ww3.arb.ca.gov/ | |
| | cc/scopingplan/2030sp_appf_finalea.pdf (last visited Dec. 11, 2019) | 4 |

| | | |
|----|---|-----------|
| 1 | CARB, Linkage, September 2018 Update: Linkage with Ontario Cap-and-Trade Program, available at https://ww3.arb.ca.gov/cc/capandtrade/linkage/linkage.htm (last visited Dec. 11, 2019)..... | 17 |
| 2 | | |
| 3 | Climate Change Partnerships, Working Across Agencies and Beyond Borders, available at https://www.climatechange.ca.gov/climate_action_team/partnerships.html (last visited Dec. 11, 2019) | 2, 20, 21 |
| 4 | | |
| 5 | Facts About Holding Limit for Linked Cap-and-Trade Programs, available at https://www.arb.ca.gov/cc/capandtrade/holding_limit.pdf at [2] (last visited Dec. 11, 2019) | 7 |
| 6 | | |
| 7 | THE FEDERALIST NO. 4 (John Jay) (Clinton Rossiter ed., Signet 2003)..... | 2 |
| 8 | Letter from Robert W. Byrne, Senior Assistant Attorney General, to Peter Krause, Legal Affairs Secretary, Mar. 16, 2017, available at https://ww3.arb.ca.gov/cc/capandtrade/linkage/linkage.htm (Attorney General’s Advice to Governor Concerning Program Linkage) (last visited Dec. 11, 2019) | 24 |
| 9 | | |
| 10 | Regulation Respecting a Cap-and-Trade System for Greenhouse Gas Emission Allowances (chapter Q-2, r. 46.1, Appendix B.1(2) (s. 37)) available at http://legisquebec.gouv.qc.ca/en/pdf/cr/Q-2,%20R.%2046.1.pdf (last visited Dec. 11, 2019) | 6 |
| 11 | | |
| 12 | | |
| 13 | Welcome to WCI CITSS, available at https://www.wci-citss.org/ (last visited Dec. 11, 2019) | 9 |
| 14 | | |
| 15 | Western Climate Initiative, Design for the WCI Regional Program at 22 (Jul. 2010) (section on “Linking Programs”) (“Design for the WCI Regional Program”), available at http://www.environnement.gouv.qc.ca/changements/carbone/documents-WCI/cadre-mise-en-oeuvre-WCI-en.pdf (last visited Dec. 11, 2019)..... | 6 |
| 16 | | |
| 17 | Western Climate Initiative, Design Recommendations for the WCI Regional Cap-and-Trade Program (Sept. 23, 2008, corrected Mar. 13, 2009) (introductory letter from “The WCI Partners”) (“Design Recommendations”), available at http://www.environnement.gouv.qc.ca/changements/carbone/documents-WCI/modele-recommande-WCI-en.pdf (last visited Dec. 11, 2019) | 6 |
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INTRODUCTION

In *Massachusetts v. EPA*, the Supreme Court wrote, “When a State enters the Union, *it surrenders certain sovereign prerogatives*. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions [and] *it cannot negotiate an emissions treaty with China or India . . .*” 549 U.S. 497, 519 (2007) (emphasis added). The Constitution simply forbids states to enter into agreements with foreign powers that would usurp the federal government’s responsibility for foreign affairs. *See* Art. I, § 10, cl. 1, 3. Yet California’s Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions of 2017 with the Canadian province of Quebec is just such an unconstitutional agreement. The text, structure, and history of the Constitution bar states from having their own foreign policy. California’s Agreement with Quebec further compounds the constitutional injury because it has the effect of undermining the United States’ foreign policy.

As the Supreme Court has repeatedly recognized, the President is “the guiding organ in the conduct of our foreign affairs.” *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). He is “the constitutional representative of the United States with regard to foreign nations.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Thus, as to foreign policy, the President possesses “plenary and exclusive power” in conducting foreign affairs “as the sole organ of the federal government in the field of international relations.” *Id.* at 320. And the President has concluded as a matter of the United States’ foreign policy that the Paris Agreement of 2015 relating to climate change, including the emission of greenhouse gases – which falls directly into the same area as California’s Agreement with Quebec – “disadvantages the United States to the exclusive benefit of other countries, leaving American workers — who I love — and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production.” Statement by President Trump on the Paris Climate Accord, Jun. 1, 2017, available at <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> (last visited Dec. 11, 2019) (Plaintiff United States of America’s Statement of Undisputed Facts (“SUF”) ¶ 8 (filed concurrently herewith)). On this basis he has stated that the

1 United States would “begin negotiations to reenter either the Paris Accord or a really entirely new
 2 transaction on terms that are fair to the United States, its businesses, its workers, its people, its
 3 taxpayers.” *Id.* On November 4, 2019, the United States submitted formal notification of its
 4 withdrawal from the Paris Agreement. *See* SUF ¶ 11. Interfering in and contrary to the foreign
 5 policy of the United States, California is continuing its own international greenhouse gas
 6 Agreement and conducting its own foreign policy. And it has admitted that it pursues initiatives
 7 such as these in “response to President Trump’s decision to withdraw from the Paris Agreement.”
 8 *See* Climate Change Partnerships, Working Across Agencies and Beyond Borders, *available at*
 9 https://www.climatechange.ca.gov/climate_action_team/partnerships.html (last visited Dec. 11,
 10 2019) (second “Multilateral Agreement”) (explaining why California and other states formed the
 11 United States Climate Alliance) (SUF ¶¶ 13, 16).

12 The Constitution gives the federal government exclusive responsibility to conduct our
 13 nation’s foreign affairs. *See Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). This is to ensure the
 14 United States speaks with one voice on the international stage and to enable the federal government
 15 to negotiate competitive agreements on behalf of the nation as whole. *See Baker v. Carr*, 369 U.S.
 16 186, 211 (1962). As John Jay presciently wrote in 1787, foreign powers could take advantage of
 17 our country if they found “each State doing right or wrong, as to its rulers may seem convenient[,]
 18 or split into three or four independent and probably discordant republics or confederacies, one
 19 inclining to Britain, another to France, and a third to Spain, and perhaps played off against each
 20 other by the three, what a poor, pitiful figure will America make in their eyes!” THE FEDERALIST
 21 NO. 4, at 44 (John Jay) (Clinton Rossiter ed., Signet 2003) (internal parentheses omitted).

22 Indeed, the Supreme Court has previously invalidated California laws less invidious and
 23 conflicting with United States foreign policy than this. *See American Ins. Assn. v. Garamendi*,
 24 539 U.S. 396, 424 (2003); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 (9th Cir.
 25 2012) (“Because California Code of Civil Procedure section 354.4 does not concern an area of
 26 traditional state responsibility and intrudes on the field of foreign affairs entrusted exclusively to
 27 the federal government, we hold that section 354.4 is preempted.”). Once again, “if the
 28

[California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.” *Garamendi*, 539 U.S. at 424 (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377 (2000)) (bracket insert original). So this Court “need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to *the entire national economy* without exception for *enclaves fenced off willy-nilly by inconsistent political tactics*.” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (emphasis added).

The rules of civil procedure allow a plaintiff to move for summary judgment before the defendant has answered; indeed, even at “the commencement of a case.” Fed. R. Civ. P. 56(a) Advisory Committee Notes to 2009 Amendment. And California’s facially unconstitutional Agreement with Quebec and related public statements and documents speak for themselves. No discovery on the moved-for claims is necessary or appropriate. No delay or extending civil proceedings are needed. *See Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1048 (9th Cir. 2015) (affirming district court’s denial of further discovery) (“The court also observed that since the primary issue on summary judgment was a pure question of law, further depositions were unlikely to be helpful.”). The United States respectfully requests the Court grant its motion for summary judgment on its first and second claims and hold that California’s Agreement is barred by the Constitution.¹

I. BACKGROUND

A. California’s foreign policy.

By California’s own statements, it has set out to address “a global problem.” According to Defendant California Air Resources Board (“CARB”):

Climate change is a global problem. *GHGs are global pollutants, unlike criteria air pollutants and toxic air contaminants, which are pollutants of regional and local concern.* Whereas pollutants with localized air quality effects have relatively short

¹The United States does not abandon its remaining two causes of action. It simply presents these two causes of action today to promote expeditious resolution of the case.

1 atmospheric lifetimes (about one day), GHGs have long atmospheric lifetimes (one
 2 to several thousand years). GHGs persist in the atmosphere for long enough time
 3 periods to be dispersed around the globe. . . . The quantity of GHGs in the
 4 atmosphere that ultimately result in climate change is not precisely known, but is
 enormous; *no single project alone would measurably contribute to an incremental
 change in the global average temperature, or to global, local, or micro climates.*

5 CARB, Final Environmental Analysis for the Strategy for Achieving California’s 2030
 6 Greenhouse Gas Target (Nov. 30, 2017) (2017 AB 32 Scoping Plan, Attachment A: Environmental
 7 and Regulatory Setting, at 24-25) (emphasis added), *available at* [https://ww3.arb.ca.gov/cc/
 8 scopingplan/2030sp_appf_finalea.pdf](https://ww3.arb.ca.gov/cc/scopingplan/2030sp_appf_finalea.pdf) (last visited Dec. 11, 2019) (SUF ¶¶ 24-26).

9 For purposes of this case, “cap-and-trade” describes a regulatory system that sets out to
 10 address what California identifies as “a global problem.” The system at issue here imposes an
 11 aggregate cap on emission of greenhouse gases (“GHGs”) into the air from a defined geographic
 12 area. California then sells or grants “allowances” that entitle holders thereof to emit a specified
 13 quantity of GHGs into the air in that geographic area. The law also creates a secondary market in
 14 which such allowances are bought and sold. It is thus both a regulatory policy and a trade
 15 agreement that differ from federal foreign policy.

16 Although allowances are bought and sold – *in the millions* – like hog bellies, they also
 17 represent incremental permits. The allowances are precisely calibrated promises by the
 18 government to establish and enforce limits on emissions. In other words, although sophisticated,
 19 *cap-and-trade is undeniably regulatory.* The allowances that make cap-and-trade possible are
 20 entirely derivative of the political process. If California and Quebec did not possess the coercive
 21 powers uniquely marking them out as governments to punish entities that emit GHGs beyond their
 22 allowances, neither the allowances themselves nor the market in which they are traded would exist.

23 California first adopted regulations to establish an internal cap-and-trade program in 2011.
 24 *See* 17 Cal. Code Regs. (“CCR”) §§ 95801-96022 (SUF ¶ 33). But from the beginning, California
 25 intended its program to transcend national boundaries. This demonstrated that the goal of the
 26 Agreement and similar initiatives has little to do with local concerns. For example, the California
 27 Global Warming Solutions Act (AB 32), enacted in 2006, requires Defendant CARB to “facilitate
 28

1 the development of integrated . . . *regional, national, and international* greenhouse gas reduction
 2 programs.” *Id.* (codified at CAL. HEALTH & SAFETY CODE § 38564) (emphasis added) (SUF ¶ 23).
 3 Similarly, 17 CCR § 95940, adopted in 2011 along with California’s internal program, anticipates
 4 that “compliance instrument[s] issued by an *external* greenhouse gas emissions trading system . . .
 5 may be used to meet” the state’s regulatory requirements, provided the external system satisfies
 6 certain criteria. *Id.* § 9540 (emphasis added) (SUF ¶ 43). Also in 2011, CARB adopted regulations
 7 to facilitate links between California’s program and initiatives in developing countries to protect
 8 tropical forests. *See, e.g., id.* § 95993 (providing that credits “may be generated from . . . Reducing
 9 Emissions from Deforestation and Forest Degradation (REDD) Plans”).²

10 These agreements reflect California’s extraterritorial aspirations. In fact, California’s
 11 journey toward a meeting-of-the-minds with Quebec started in 2006 with the passage of AB 32,
 12 noted above. In that year, then-Governor Arnold Schwarzenegger declared that California was a
 13 “nation state” with its own foreign policy. Douglas A. Kysar & Bernadette A. Meyler, *Like a*
 14 *Nation State*, 55 U.C.L.A. L. REV. 1621, 1622 (2008) (quoting the Governor’s remarks on
 15 California’s “own foreign policy” with respect to climate) (SUF ¶ 19). He said this with British
 16 Prime Minister Tony Blair at his side. *See id.* Not long after, he said “[w]e are the modern
 17 equivalent of the ancient city-states of Athens and Sparta. California has the ideas of Athens and
 18 the power of Sparta Not only can we lead California into the future . . . we can show the
 19 nation and the world how to get there. We can do this because we have the economic strength, the
 20 population, the technological force of a nation-state.” Adam Tanner, Schwarzenegger: California
 21 is ‘Nation State’ Leading World, *Washington Post* (Jan. 9, 2007) (paragraph break omitted),
 22 available at [https://www.washingtonpost.com/wp-dyn/content/article/2007/01/09/AR200701090](https://www.washingtonpost.com/wp-dyn/content/article/2007/01/09/AR2007010901427.html)
 23 [1427.html](https://www.washingtonpost.com/wp-dyn/content/article/2007/01/09/AR2007010901427.html) (last visited Dec. 11, 2019) (SUF ¶ 20).

25
 26 ²On September 19, 2019, CARB adopted criteria for evaluating REDD Plans, although it has yet
 27 to approve a formal link with any such plan. See California Tropical Forest Standard: Criteria for
 28 Assessing Jurisdiction-Scale Programs that Reduce Emissions from Tropical Deforestation,
 available at https://ww3.arb.ca.gov/cc/ghgsectors/tropicalforests/ca_tropical_forest_standard_english.pdf (last visited Dec. 11, 2019) (SUF ¶ 44).

Beginning in February 2007, the governors of several states, including California, along with the premiers of several provinces, including Quebec, formed or joined the Western Climate Initiative, the parent of Defendant Western Climate Initiative, Inc., to establish a North American market to regulate GHGs. *See* Western Climate Initiative, Design Recommendations for the WCI Regional Cap-and-Trade Program (Sept. 23, 2008, corrected Mar. 13, 2009) (introductory letter from “The WCI Partners”) (“Design Recommendations”), available at <http://www.environnement.gouv.qc.ca/changements/carbone/documents-WCI/modele-recommande-WCI-en.pdf> (last visited Dec. 11, 2019); Western Climate Initiative, Design for the WCI Regional Program at 22 (Jul. 2010) (section on “Linking Programs”) (“Design for the WCI Regional Program”), available at <http://www.environnement.gouv.qc.ca/changements/carbone/documents-WCI/cadre-mise-en-oeuvre-WCI-en.pdf> (last visited Dec. 11, 2019) (SUF ¶¶ 28-29).

In 2008, Western Climate Initiative released its design recommendations. This was followed in 2010 by its actual design for a transnational program. *See* Design Recommendations, *supra*; Design for the WCI Regional Program, *supra*. (SUF ¶¶ 29-30). The design called for linkage of markets across jurisdictions to, among other things, increase liquidity and create economies of scale. *See* Design for the WCI Regional Program, *supra*, at 22. (SUF ¶ 31). Smaller jurisdictions, like Quebec, would be able to link to larger ones, like California. This linkage would stabilize the smaller states’ own systems and, in some cases, make them viable. *See id.* (SUF ¶ 32).

In October 2011, California adopted its internal program on the basis of Western Climate Initiative’s design. Quebec followed suit in December 2011. Regulation Respecting a Cap-and-Trade System for Greenhouse Gas Emission Allowances (chapter Q-2, r. 46.1, Appendix B.1(2) (s. 37)) available at <http://legisquebec.gouv.qc.ca/en/pdf/cr/Q-2,%20R.%2046.1.pdf> (last visited Dec. 11, 2019) (SUF ¶ 45). In November 2011, between these events, Western Climate Initiative formed Defendant Western Climate Initiative, Inc. (“WCI”) to facilitate linkage of the two programs. (SUF ¶ 46).

Although California’s cap-and-trade program has many moving parts, they ultimately reflect the description set forth above. *See* 17 CCR §§ 95801-96022 (SUF ¶ 33). “Covered entities” include manufacturers, generators of electrical power, suppliers of natural gas, and others whose annual output of GHGs equals or exceeds specific thresholds. *See id.* §§ 95811, 95812. For each metric ton of CO₂ or CO₂ equivalent that a covered entity emits into the air, it must “surrender” a “compliance instrument.” *See id.* § 95820(c) (SUF ¶ 35). There are two types of such instruments: “allowances” and “offset credits.” *See id.* § 95820 (SUF ¶ 36). CARB distributes allowances to covered entities through various methods, *see, e.g., id.* § 95890, but the limits become stricter over time. *See id.* §§ 95850-95858. Covered entities may obtain additional allowances by buying them at periodic auctions, *see id.* §§ 95910-95915, or from other authorized parties, *see id.* §§ 95920-95922 (SUF ¶ 37). They can also obtain offset credits by undertaking projects (such as forestry projects) designed to remove CO₂ from the atmosphere, *see id.* § 95970(a)(1) (SUF ¶ 39). Covered entities are also permitted to “bank” instruments, *see id.* § 95922, although California restricts the total number an entity may hold at one time. *See* Facts About Holding Limit for Linked Cap-and-Trade Programs, available at https://www.arb.ca.gov/cc/capandtrade/holding_limit.pdf at 2 (last visited Dec. 11, 2019) (SUF ¶ 40). Covered entities may bank compliance instruments through 2030. *Id.* (SUF ¶ 41).

The current Agreement, as renegotiated in 2017, integrates California’s program with that of Quebec in a virtually seamless web.³ In fact, the word “harmonize,” or one of its cognates, appears *thirty-seven times* in the Agreement. SUF ¶ 50. Among many other things, the Agreement requires the parties to evaluate their programs on a continuous basis to “promote continued harmonization and integration.” *Id.*, Art. 4 (SUF ¶ 51). And, although the Agreement allows a

³The current agreement, as renegotiated in 2017, is available at https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf (last visited Dec. 11, 2019) (SUF ¶ 45). This document is entitled “Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions” and is referred to herein as “the Agreement.” Ontario was briefly a party to the Agreement but withdrew in July 2018. *See* Archived – Cap and trade, available at <https://www.ontario.ca/page/cap-and-trade> (last visited Dec. 11, 2019) (SUF ¶ 70).

1 party to “*consider* making changes to its . . . program,” it goes on to provide that “any proposed
 2 changes or additions *shall be discussed between the Parties.*” *Id.*, Art. 4 (SUF ¶ 52) (emphasis
 3 added). It even provides that, where differences arise between “elements” of the parties’ programs,
 4 “the Parties shall determine if such elements need to be harmonized for the proper functioning and
 5 integration of the programs.” *Id.* (SUF ¶ 53). The parties also agree to consult with each other
 6 before making changes to the “offset components” of their programs. *See id.*, Art. 5 (SUF ¶ 54).

7 The Agreement even establishes a mechanism for the resolution of differences. *See id.*,
 8 Art. 20 (“If approaches for resolving differences . . . cannot be developed in a timely manner
 9 through staff workgroups, the Parties shall constructively engage through the Consultation
 10 Committee, and if needed with additional officials of the Parties, or their designees.”); *id.*, Art. 13
 11 (establishing the Consultation Committee) (SUF ¶ 55). On technical issues, the parties agree to
 12 rely on Defendant WCI. *See id.*, Art. 12 (noting that WCI “was created to perform such services”)
 13 (SUF ¶ 56). Finally, the Agreement provides that “auctioning of compliance instruments by the
 14 Parties’ respective programs shall occur jointly.” *Id.*, Art. 9 (SUF ¶ 57). In short, what we have
 15 here is a complex, highly integrated *regulatory apparatus*.

16 Implementation of the Agreement is punctuated by joint auctions, which have been many
 17 in number. In fact, as of August 20, 2019, twenty such auctions had taken place under the
 18 Agreement and its predecessor. See CARB, Auction Notices and Reports, *available at* [https://ww3](https://ww3.arb.ca.gov/cc/capandtrade/auction/auction_notices_and_reports.htm)
 19 [.arb.ca.gov/cc/capandtrade/auction/auction_notices_and_reports.htm](https://ww3.arb.ca.gov/cc/capandtrade/auction/auction_notices_and_reports.htm) (last visited Dec. 11, 2019)
 20 (SUF ¶ 58). These are major pecuniary events. As of September 2019, California reported that it
 21 had received almost twelve *billion* dollars in proceeds from the sale of allowances since 2012.
 22 (The specific figure was \$11,796,013,586.66.) *See* California Cap-and-Trade Program, Summary
 23 of Proceeds to California and Consigning Entities, *available at* [https://ww3.arb.ca.gov/cc/capand](https://ww3.arb.ca.gov/cc/capandtrade/auction/proceeds_summary.pdf)
 24 [trade/auction/proceeds_summary.pdf](https://ww3.arb.ca.gov/cc/capandtrade/auction/proceeds_summary.pdf) (last visited Dec. 11, 2019) (SUF ¶ 38).

25 Given the scope of this operation, these auctions are complex. Allowances are sold in lots
 26 of 1000, divided to reflect California’s and Quebec’s relative contribution. *See* CARB, Detailed
 27 Auction Requirements and Instructions, *available at* <https://ww3.arb.ca.gov/cc/capandtrade/>
 28

1 [auction/auction_requirements.pdf](#) at pt. IX, p. 43 (see Table of Contents for page number) (last
 2 visited Dec. 11, 2019) (SUF ¶ 59). As CARB illustrates, if a joint auction “included 60 percent
 3 California 2019 vintage allowances and 40 percent Québec 2019 vintage allowances, each bid
 4 lot . . . would include 600 California 2019 vintage allowances and 400 Québec 2019 vintage
 5 allowances.” *Id.* (SUF ¶ 60). Notably, buyers do not know the exact mix of the allowances that
 6 they purchase because “serial numbers are not available to account holders.” *See* CARB, Chapter
 7 5: How Do I Buy, Sell, and Trade Compliance Instruments?, available at [https://ww3.arb.ca.gov](https://ww3.arb.ca.gov/cc/capandtrade/guidance/chapter5.pdf)
 8 [/cc/capandtrade/guidance/chapter5.pdf](#) at 28 (last visited Dec. 11, 2019) (SUF ¶ 61). Trades are
 9 facilitated through the Compliance Instrument Tracking System Service (“CITSS”), which
 10 monitors accounts and compliance. *See* Welcome to WCI CITSS, available at [https://www.wci-](https://www.wci-citss.org/)
 11 [citss.org/](#) (last visited Dec. 11, 2019) (SUF ¶ 62). Purchases are currently settled through Deutsche
 12 Bank. *See* California Cap-and-Trade Program, Cap-and-Trade Auctions and Reserve Sales
 13 Financial Services Administration (Aug. 24, 2018), available at [https://ww3.arb.ca.gov/cc/capand](https://ww3.arb.ca.gov/cc/capandtrade/auction/forms/financial_services_administration_faq.pdf)
 14 [trade/auction/forms/financial_services_administration_faq.pdf](#) (last visited Dec. 11, 2019) (SUF
 15 ¶ 63).

16 Under the Agreement, covered entities in California are authorized to trade instruments
 17 with covered entities in Quebec, and vice-versa, “as provided for under [the parties’] respective
 18 cap-and-trade program regulations.” Agreement, Art. 7 (SUF ¶ 64). Also under the Agreement,
 19 California agrees to accept instruments issued by Quebec to satisfy its regulatory requirements,
 20 and Quebec agrees to reciprocate. *See id.*, Art. 6 (SUF ¶ 65).

21 The text and high degree of mutual commitment exhibited in the Agreement belies any
 22 claim that the Agreement is without legal force or effect. On the contrary, the Agreement specifies
 23 that it “shall enter into full force and effect” and that the English and French version of the text
 24 “have the same legal force.” *Id.*, Arts. 22, 23. In fact, the word “shall” appears *over fifty times* in
 25 the Agreement, in a wide variety of contexts. (SUF ¶ 66). Moreover, termination of the Agreement
 26 requires unanimous consent of the parties and is not legally effective until “12 months after the
 27 last of the Parties has provided is consent to the other Parties.” *Id.*, Art. 22 (SUF ¶ 67). In the
 28

1 event of either withdrawal or termination, a party's "obligations under article 15 regarding
 2 confidentiality of information . . . continue to remain in effect." *Id.*, Art. 17 (SUF ¶ 68). The
 3 enormous sums paid for allowances and their bankability until 2030 also refute any claim that the
 4 Agreement is merely hortatory. In short, the text, operation, and forensic architecture of the
 5 Agreement foreclose any serious claim that it is anything short of a binding instrument.

6 **B. The United States' foreign policy.**

7 The United States is a party to the United Nations Framework Convention on Climate
 8 Change of 1992 ("UNFCCC"). (SUF ¶¶ 1-2). This has as its "ultimate objective . . . stabilization
 9 of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous
 10 anthropogenic interference with the climate system. S. Treaty Doc. No. 102-38, 1771 U.N.T.S.
 11 107 (entered into force Mar. 21, 1994), Art. 2 (SUF ¶ 3). Being ratified by the President with the
 12 advice and consent of the Senate, the UNFCCC is law of the land. See U.S. CONST., Art. II, § 2,
 13 cl. [2]; Art. VI, § 2, cl [2]. (SUF ¶ 2).

14 By entering into the UNFCCC, the federal government undertook obligations to its foreign
 15 treaty partners with respect to the "stabilization of greenhouse gas concentrations in the
 16 atmosphere at a level that would prevent dangerous anthropogenic interference with the climate
 17 system." 1771 U.N.T.S. 107, Art. 2. (SUF ¶ 3). Under the UNFCCC, "[a]ll Parties," including
 18 the United States, are obliged to "(b) [f]ormulate, implement, publish and regularly update national
 19 and, where appropriate, regional programmes containing measures to mitigate climate change by
 20 addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not
 21 controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate
 22 change [and] (c) [p]romote and cooperate in the development, application and diffusion, including
 23 transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic
 24 emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors . . ."
 25 *Id.*, Art. 4.1(b), (c) (SUF ¶ 4).

26 In 2015, various Parties to the UNFCCC adopted the Paris Agreement of 2015. (SUF ¶ 5).
 27 Under the Paris Agreement, the parties are to prepare and communicate intended "nationally
 28

determined contributions” that describe plans or targets related to the reduction of GHG emissions, and periodically report progress on such contributions. (SUF ¶ 6). The United States joined the Paris Agreement, which President Obama entered into as an executive agreement rather than as an Article II treaty by and with the advice and consent of the Senate.

On March 28, 2017, in Executive Order 13,783, President Trump set forth the United States’ position on how it would seek to reconcile the nation’s environmental, economic, and strategic concerns, both domestically and at the international level. In that order, the President announced that, “[e]ffective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, *including with respect to the consideration of domestic versus international impacts* and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.” Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, § 5(c), 82 Fed. Reg. 16093, 16096 (Mar. 28, 2017) (emphasis added) (SUF ¶ 7). Thereafter, President Trump announced that the United States would withdraw from the Paris Agreement. (SUF ¶ 8). The President’s stated reasons were many. They included that the Paris Agreement:

- “could cost America as much as 2.7 million lost jobs by 2025,”
- “punishes the United States . . . while imposing no meaningful obligations on the world’s leading polluters,”
- “[allows] China . . . to increase these emissions by a staggering number of years — 13,”
- “makes [India’s] participation contingent on receiving billions and billions and billions of dollars in foreign aid from developed countries,” and
- “disadvantages the United States to the exclusive benefit of other countries, leaving American workers — who I love — and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production”

Statement by President Trump on the Paris Climate Accord, Jun. 1, 2017, *available at* <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> (last visited Dec. 11, 2019) (SUF ¶ 9). For these reasons, among others, President Trump declared the United States would “negotiate a new deal that protects our country and its taxpayers.” *Id.* (SUF ¶ 10). On November 4, 2019, the United States formally noticed of its withdrawal from the Paris Agreement. In accordance with the terms of the Paris Agreement, the United States’ withdrawal will become effective on November 4, 2020.

C. Procedural history.

The United States filed its Complaint on October 23, 2019, ECF No. 1, and an Amended Complaint on November 19, 2019, ECF No. 7. On November 22, 2019, this Court, per District Judge John A. Mendez, approved a Stipulation and Order extending the time for all Defendants to answer or move to dismiss Plaintiff’s Complaint or Amended Complaint to January 6, 2020. ECF No. 11. In this same stipulation and order, all Defendants agreed to waive any objection to the form or adequacy of service of process.

The Amended Complaint states four causes of action. They are predicated upon the Treaty Clause, the Compact Clause, the Foreign Affairs Doctrine, and the Dormant Foreign Commerce Clause, respectively. To facilitate expeditious resolution of this case and to conserve the Court’s resources, the United States moves for summary judgment only on the first two causes of action at this time. Although the United States sees the remaining two causes of action as equally dispositive and likewise sufficient to justify the relief requested, disposition of the first two claims requires no lengthy civil proceedings. These claims can be expeditiously and summarily adjudicated based on the Constitution, California’s Agreement, and the undisputed record regarding other statements and admissions by California and its officials.

SUMMARY OF ARGUMENT

The Agreement flatly violates the Treaty Clause of Article I of the Constitution. California and Quebec are operating a massive, integrated regulatory apparatus that lacks a connection to any traditional local interest. The two jurisdictions do not share a border. Indeed, at their closest point,

1 they are separated by approximately 2500 miles. They are not building a bridge across a body of
 2 water that they both adjoin. Nor are they pursuing fleeing suspects into each other's territory.
 3 They have formed a purely political pact, which the Article I Treaty Clause forbids.

4 The political character of the Agreement is undisputable from both its text and its history.
 5 It sets up a complex alliance, complete with administrative support. This effectuates the two
 6 jurisdictions' shared regulatory policy. The Agreement regulates the movement of articles of
 7 commerce (albeit articles that are entirely regulatory in nature) between the two jurisdictions. And
 8 the Agreement enhances the authority of the Golden State vis-à-vis that of the United States by
 9 usurping part of the United States' exclusive role in formulating this nation's foreign policy and
 10 undermining the President's practical and express authority to negotiate more favorable
 11 agreements for the United States as a whole.

12 The Supreme Court has held that the word "Treaty" in the Article I Treaty Clause is best
 13 understood as applying to agreements "of a political character." *Virginia v. Tennessee*, 148 U.S.
 14 503, 519 (1893) (attributing this understanding to Justice Story). *See also United States Steel*
 15 *Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 463 (1978) (emphasis added) (noting Justice
 16 Story's theory that "[t]reaties, alliances and confederations . . . generally connote military *and*
 17 *political* accords and are forbidden to the States"). The Agreement is precisely such a device.

18 But even if the Agreement did not constitute a "Treaty, Alliance, or Confederation," it
 19 certainly constitutes a compact with Quebec. This is similarly forbidden by the Compact Clause,
 20 given its lack of congressional consent. Although the Supreme Court has held that an agreement
 21 involving purely local concerns does not trigger the Compact Clause, this principle cannot save
 22 the Agreement, given its lack of a connection to a discernible local interest.

23 **ARGUMENT**

24 Summary judgment is proper "if the movant shows that there is no genuine dispute as to
 25 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
 26 "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*,
 27 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit
 28

1 under the governing law will properly preclude the entry of summary judgment. Factual disputes
 2 that are irrelevant or unnecessary will not be counted.” *Id.* Here, as elaborated below, there is no
 3 genuine dispute as to any material fact regarding the Agreement. The Agreement is facially a
 4 politically oriented “Treaty.” At a minimum, it is a congressionally unauthorized “Compact.” The
 5 United States is entitled as a matter of law to judgment declaring the Agreement invalid.

6 **I. The Agreement violates the Article I Treaty Clause.**

7 The Constitution expressly forbids states to enter into treaties. In exchange for the
 8 advantages of a unified foreign policy, the states give up the right to take their own approach to
 9 military or political relations with other countries. As the Supreme Court has held, “[w]hen a State
 10 enters the Union, *it surrenders certain sovereign prerogatives*. Massachusetts cannot invade
 11 Rhode Island to force reductions in greenhouse gas emissions [and] *it cannot negotiate an*
 12 *emissions treaty with China or India.*” *Massachusetts*, 549 U.S. at 519 (emphasis added). Yet
 13 entering into an emissions treaty with a foreign government (here, the government of Quebec) is
 14 exactly what California has done.

15 **A. The Agreement is a “Treaty” for purposes of the Article I Treaty Clause because it**
 16 **constitutes a political alliance.**

17 California may strain to deny that its Agreement with Quebec is a treaty. But this is a legal,
 18 not a factual, question—or at least a mixed question of law and undisputed fact. *See Virginia*, 148
 19 U.S. at 519. And analysis of the Agreement’s terms reveals one of political alliance between the
 20 two jurisdictions. Although the Constitution does not define the term “Treaty” or distinguish it
 21 from the terms “Alliance,” “Confederation,” “Agreement” or “Compact,” *see Made in the USA*
 22 *Found. v. United States*, 242 F.3d 1300, 1305 (11th Cir. 2001), the Supreme Court has said more
 23 than once that the term, as it is used in the Article I Treaty Clause, is best understood as applying
 24 to agreements “of a political character.” *Virginia*, 148 U.S. at 519 (discussing the term in the
 25 context of a Compact Clause challenge); *United States Steel*, 434 U.S. at 463 (same). The
 26 Agreement is a device “of a political character” in this sense. California has no more proprietary
 27 or quasi-proprietary interest in Quebec’s approach to regulating GHG emissions than does any
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1 other state in the Union, any more than Texas has a proprietary (or quasi-proprietary) interest in
 2 how much water pollution factories of Alberta discharge. In both cases, foreign policy is properly
 3 left to the federal government, to which the Constitution entrusts the interests of the nation as a
 4 whole, as opposed to the parochial interests of any one state.

5 To elaborate, the Supreme Court explained in *Virginia* that the phrase “treaty, alliance, or
 6 confederation” applies “to treaties *of a political character*; such as [among other things] treaties
 7 of *confederation*, in which the parties are leagued for *mutual government [and] political co-*
 8 *operation*, and . . . treaties . . . conferring . . . general commercial privileges.” 148 U.S. at 519
 9 (emphasis added). The Agreement meets this definition with room to spare. In addition to being
 10 freighted with “a political character,” it confederates the laws of the two jurisdictions in an
 11 important area of commercial policy (with billions of dollars trading hands). It plainly establishes
 12 a “league for mutual government” in that area. As noted above, California and Quebec have
 13 committed themselves across a wide menu of subjects, not only to coordinate what they do, but
 14 also not to depart from their integrated activities without scrupulous consultation. *See* Agreement,
 15 Arts. 3-7, 9, 12-13, 17, 20, 22 (SUF ¶¶ 51-57, 67-69). The Agreement also meets *Virginia*’s
 16 definition of a treaty by creating an exclusive market for the purchase and sale of certain articles
 17 of commerce, albeit articles that are entirely regulatory in nature.⁴

18 To be sure, a device like the Agreement would not necessarily need to be entered into under
 19 the Article II treaty power, as opposed to as an executive agreement, if it were entered into by the
 20 federal government. *See generally Made in the USA Found.*, 242 F.3d at 1305. In other words,
 21 “the [Supreme] Court has never decided what sorts of international agreements, if any, might
 22 require Senate ratification.” *Id.* But the precedents and practices of the federal government under
 23 the Treaty Clause of Article II do not carry over to judging what state actions are barred by the
 24 Treaty Clause of Article I. This distinction arises for several reasons. Most importantly, the

25
 26 ⁴In arguing that the Agreement violates the Article I Treaty Clause, the United States does not
 27 concede that California has the capacity to enter into a treaty with Quebec governed by
 28 international law. Under international law, only nation-states may enter into treaties, and the
 Article I Treaty Clause bars California from entering into a treaty in any event.

1 Constitution explicitly allocates to the President an enormous span of authority with respect to
 2 foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *Made*
 3 *in the USA Found.*, 242 F.3d at 1313 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (“The
 4 Supreme Court has repeatedly recognized that the President is the nation’s ‘guiding organ in the
 5 conduct of our foreign affairs,’ in whom the Constitution vests ‘vast powers in relation to the
 6 outside world.’”). The President may enter into certain categories of executive agreements
 7 pursuant to this authority, as well as pursuant to authority provided by statute. *See, e.g., United*
 8 *States v. Pink*, 315 U.S. 203 (1942) (President’s recognition of Russian government and
 9 assignment of claims pursuant to the Litvinov Assignment was binding on State courts); *B. Altman*
 10 *& Co. v. United States*, 224 U.S. 583, 601 (1912) (recognizing the validity of commercial
 11 agreement authorized by statute but not entered into pursuant to the Article II Treaty Clause).
 12 There is no comparable assignment of authority to the states.

13 **B. The Agreement is a binding instrument.**

14 Defendants may try to suggest that the Agreement lacks legal force or significance. But
 15 such self-serving attempts at rebranding do not change the essential political character of
 16 California’s mutual commitments with Quebec. As a matter of text, the Agreement knits the two
 17 jurisdictions into a virtually seamless regulatory body. Under Article 4, California undertakes to
 18 conform its regulations as much as possible – and certainly in every material respect – to those of
 19 Quebec. California and Quebec commit “to promote continued harmonization and integration of
 20 the Parties’ programs.” Agreement, Art. 4.. (SUF ¶¶ 49-52). Indeed, if California even
 21 “consider[s] making changes to its . . . program,” it must “discuss” such “proposed changes or
 22 additions” with Quebec. *Id.* (emphasis added) (SUF ¶ 52). The same goes for “proposed changes”
 23 to the “offset component” of its program. *Id.*, Art. 5 (SUF ¶ 54). Also, as noted above, the word
 24 “shall” appears over fifty times in the Agreement, and the phrase “the parties shall” appears twenty
 25 times. (SUF ¶ 66). The ubiquity of this word and this phrase demonstrates that the Agreement is
 26 not merely hortatory or aspirational.

1 Even the Agreement’s provisions for withdrawal and termination underscore its binding
2 nature. To be sure, parties may withdraw. But the Agreement’s formal “withdrawal” provision
3 actually proves there are legally binding commitments between the two jurisdictions that must be
4 withdrawn from. In other words, being able to *withdraw* from an agreement—even unilaterally,
5 at any time—does not mean that the jurisdictions are not obliged *now* to abide by a common set
6 of principles and terms *before withdrawing*. Anyone who has ever played chess and eventually
7 resigned mid-game knows this. See *Garcia v. Texas*, 564 U.S. 940, 944 (2011) (Breyer, J.,
8 dissenting) (noting that, “[a]lthough the United States ha[d] . . . given notice of withdrawal from
9 the Optional Protocol, . . . that withdrawal [did] not alter the binding status of its prewithdrawal
10 obligations”). In addition, termination of the Agreement requires unanimous consent of the parties
11 and is not legally effective until “12 months after the last of the Parties has provided is consent to
12 the other Parties.” Agreement, Art. 22 (SUF ¶ 67). Finally, even with withdrawal or termination,
13 a party’s certain “*obligations* under article regarding confidentiality of information . . . continue
14 to *remain in effect*.” *Id.*, Art. 17 (SUF ¶ 68). Thus, the plain text of the Agreement reflects beyond
15 dispute that California is in a legally binding agreement with Quebec at the moment.

16 The binding nature of the Agreement can also be seen in its operation. As noted above,
17 various entities have expended *billions* of dollars for California’s allowances. CARB further
18 contemplates that covered entities may bank instruments *until 2030*. A trading platform that entails
19 the exchange of billions of dollars, the retention of an investment bank to settle accounts, and the
20 banking of valuable allowances of a regulatory nature a decade into the future is the antithesis of
21 a nonbinding instrument.

22 This same binding dynamic can be observed in California’s response to Ontario’s
23 withdrawal from the Agreement in 2018. Ontario was briefly a tri-party participant in this trading
24 regime. But it recently dropped out. Notwithstanding Ontario’s decision not to participate in the
25 integrated market any longer, *California wrapped its arms around Ontario’s allowances, and still*
26 *does*. See CARB, Linkage, September 2018 Update: Linkage with Ontario Cap-and-Trade
27 Program, available at <https://ww3.arb.ca.gov/cc/capandtrade/linkage/linkage.htm> (last visited
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Dec. 11, 2019) (SUF ¶¶ 70-71); 17 CCR § 95943, “[c]ompliance instruments issued by the Government of Ontario that are held in California covered entity, opt-in covered entity, and general market participant accounts . . . as of June 15, 2018 continue to remain valid for compliance and trading purposes.”).

The binding nature of the Agreement is also exemplified by the trajectory of California’s “own foreign policy” since the enactment of AB 32 in 2006. Thirteen years ago, California set out to establish a cap-and-trade program that could extend beyond its borders. *See* CAL. HEALTH & SAFETY CODE § 38564 (codifying AB 32) (emphasis added) (instructing Defendant CARB to “facilitate the development of integrated and cost-effective *regional, national, and international* greenhouse gas reduction programs”) (SUF ¶ 23). In addition, California’s 2011 regulations implementing AB 32 explicitly contemplated that that “compliance instrument[s] issued by an *external* greenhouse gas emissions trading system (GHG ETS) may be used to meet” the state’s regulatory requirements. 17 CCR § 95940 (emphasis added). California cannot credibly argue that it is not bound by something that it has been committing itself to since 2006.

II. The Agreement at a minimum violates the Compact Clause.

If for any reason the Agreement did not violate the Article I Treaty Clause, and surely it does, then the Agreement must violate the Compact Clause. (In fact, it violates both.) This latter clause forbids states to “enter into any Agreement or Compact . . . with a foreign Power” without congressional approval. U.S. CONST., Art. I, § 10, cl. 3. Congress has not given its consent to the Agreement. Nor have Defendants even asked Congress for that consent. The Agreement thus also runs afoul of the Compact Clause.

A. The Agreement is a “Compact” under the Compact Clause because of its emphatically non-local character.

Article I, Section 10, of the Constitution contemplates two categories of agreements that states might seek to enter: (1) “Treat[ies], Alliance[s], [and] Confederation[s],” from which states are categorically precluded; and (2) “Agreement[s] [and] Compact[s],” which states may enter with Congress’ approval. *Id.* cl. [1] (Treaty Clause); cl. [3] (Compact Clause). In *Virginia v.*

1 *Tennessee*, discussed above in connection with the Treaty Clause, the Supreme Court also
 2 recognized a category of compacts or agreements that do not require congressional consent
 3 because of their local nature. *See* 148 U.S. at 518-19. In that case, the Court held that only
 4 domestic compacts or agreements affecting the status of the federal government *as* the federal
 5 government (*i.e.*, implicating states' authority vis-à-vis that of the United States) require
 6 congressional consent. As Justice Field wrote for the Court in that case, "it is evident that the
 7 [Compact Clause] is directed to the formation of any combination tending to the increase of
 8 political power in the States, which may encroach upon or interfere with the just supremacy of the
 9 United States." *Id.* at 519.

10 Notably, however, Justice Field preceded this statement with four concrete examples of the
 11 kind of intensely local cooperation between states that would not implicate the clause. Not one
 12 comes close to California's integrated cap-and-trade agreement with an international sovereign:

13 *If, for instance, Virginia should come into possession and ownership of a small*
 14 *parcel of land in New York which the latter [S]tate might desire to acquire as a site*
 15 *for a public building, it would hardly be deemed essential for the latter [S]tate to*
 16 *obtain the consent of Congress before it could make a valid agreement with Virginia*
 17 *for the purchase of the land.*

18 *Id.* at 518 (emphasis added).

19 *If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should*
 20 *desire to transport them a part of the distance over the Erie Canal, it would hardly*
 21 *be deemed essential for that State to obtain the consent of [C]ongress before it could*
 22 *contract with New York for the transportation of the exhibits through that [S]tate in*
 23 *that way.*

24 *Id.* (emphasis added).

25 *If the bordering line of two States should cross some malarious and disease-*
 26 *producing district, there could be no possible reason, on any conceivable public*
 27 *grounds, to obtain the consent of [C]ongress for the bordering [S]tates to agree to*
 28 *unite in draining the district, and thus removing the cause of disease.*

Id. (emphasis added).

So, in case of threatened invasion of cholera, plague, or other causes of sickness
and death, it would be the height of absurdity to hold that the threatened [S]tates
could not unite in providing means to prevent and repel the invasion of the pestilence

1 without obtaining the consent of [C]ongress, which might not be at the time in
2 session.

3 *Id.* (emphasis added). In each of these examples, two adjoining states are exercising their police
4 powers in traditional, entirely local ways to promote the health, safety or welfare of their
5 population. All four examples fall far short of implicating the prerogatives of the United States.
6 (In the actual case, Virginia and Tennessee were trying to fix a common boundary. *See id.* at 504.)

7 Even if *Virginia*'s recognition of a category of agreements that do not implicate the
8 Compact Clause applies beyond the domestic arena, California's Agreement with Quebec could
9 not possibly qualify. This is evident for a number of reasons.

10 First, the Agreement is about as "local" as the United Nations. California and Quebec do
11 not share a border. They are not seeking to abate a nuisance that affects them in some entirely
12 localized way, apart from every other state or province of Canada. By its own admission and by
13 the totality of its actions, California has made clear that it is pursuing its "own foreign policy."
14 Kysar & Meyler, *supra* (quoting Governor Schwarzenegger) (SUF ¶ 19). The Agreement is simply
15 one example among many of California's aspirations as a "nation-state." Adam Tanner, *supra*
16 (quoting Governor Schwarzenegger) (SUF ¶ 20). According to California, the state is a party to
17 *seventy-two* active bilateral and multilateral "agreements" with national and subnational foreign
18 and domestic governments relating to environmental policy alone. *See* Climate Change
19 Partnerships, Working Across Agencies and Beyond Borders, *available at* [https://www.climate](https://www.climatechange.ca.gov/climate_action_team/partnerships.html)
20 [change.ca.gov/climate_action_team/partnerships.html](https://www.climatechange.ca.gov/climate_action_team/partnerships.html) (last visited Dec. 11, 2019) (amalgamating
21 agreements) ("Climate Change Partnerships") (SUF ¶ 16). California states that the purpose of
22 these agreements is "to strengthen the global response to the threat of climate change and to
23 promote a healthy and prosperous future for all citizens." *Id.*

24 California's would-be "own foreign policy" is particularly detrimental to the United States'
25 foreign policy on climate change issues, including in the context of the currently declared policy
26 with respect to the Paris Agreement. Indeed, on June 6, 2017, mere days after President Trump
27 announced the United States' intent to withdraw from the Paris Agreement, Jerry Brown, then-
28 Governor of California, met in Beijing with China's President Xi Jinping to discuss environmental

1 issues. *See* Javier C. Hernández & Chris Buckley, Xi Jinping and Jerry Brown of California Meet
 2 to Discuss Climate Change, N.Y. Times (June 6, 2017), *available at* [https://www.nytimes.com](https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown-california-climate.html)
 3 [/2017/06/06/world/asia/xi-jinping-china-jerry-brown-california-climate.html](https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown-california-climate.html) (last visited Dec.
 4 11, 2019) (SUF ¶ 14). Also in 2017, in what the states in question called a direct response to the
 5 United States’ announcement that it intended to withdraw from the Paris Agreement, California
 6 and other states entered into the United States Climate Alliance, committing to reducing GHG
 7 emissions in a manner consistent with the goals of the Paris Agreement. *See* Climate Change
 8 Partnerships, *supra* (second “Multilateral Agreement”) (explaining that the United States Climate
 9 Alliance was founded “in response to President Trump’s decision to withdraw from the Paris
 10 Agreement”) (SUF ¶ 13). In short, California’s broad and elaborate diplomatic footprint
 11 overwhelms any claim that the Agreement responds to any discrete, truly-local interest.

12 Second, and directly implicating *Virginia*, the Agreement could complexify the federal
 13 government’s ability to negotiate competitive agreements in the foreign arena with the entirety of
 14 the economy at its back. Diplomacy is often a matter of leverage and the possession of multiple
 15 options. Indeed, this is why the Supreme Court has invalidated previous California pretensions to
 16 address international problems. Two decades ago, California passed legislation requiring any
 17 insurer doing business in that State to disclose information about all policies sold in Europe
 18 between 1920 and 1945. *See Garamendi*, 539 U.S. at 401. However well-intentioned this attempt
 19 to seek justice for the victims of the Nazi genocide residing within California may have been, the
 20 Supreme Court recognized that these efforts conflicted with the policies being pursued by the
 21 Federal Government pursuant to treaties of the United States. The legislation “‘compromise[d]
 22 the very capacity of the President to speak for the Nation with one voice in dealing with other
 23 governments’ to resolve claims against European companies arising out of World War II.” *Id.* at
 24 424 (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000)). “Quite
 25 simply, if the [California] law is enforceable the President has less to offer and less economic and
 26 diplomatic leverage as a consequence.” *Garamendi*, 539 U.S. at 424.

1 The Supreme Court’s logic is as applicable to California’s latest foray into foreign policy
 2 as it was then. If California (and follow-on states) can deprive the federal government of some of
 3 those options, our nation’s ability – and particularly the President’s ability – to forge agreements
 4 and other diplomatic solutions that optimize benefits for the entire country would be compromised.
 5 *See Crosby*, 530 U.S. at 381 (emphasis added) (“We need not get into any general consideration
 6 of limits of state action affecting foreign affairs to realize that the President’s maximum power to
 7 persuade rests on his capacity to bargain for the benefits of access to *the entire national economy*
 8 without exception for *enclaves fenced off willy-nilly by inconsistent political tactics.*”); *Dames &*
 9 *Moore v. Regan*, 453 U. S. 654, 673 (1981) (describing the President’s control of funds valuable
 10 to another country as a “bargaining chip”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“Our
 11 system of government is such that the interest of the cities, counties and states, no less than the
 12 interest of the people of the whole nation, imperatively requires that federal power in the field
 13 affecting foreign relations be left entirely free from local interference.”). Under *Virginia*, an
 14 arrangement that “tend[s] to the increase of political power in the [S]tates, which may encroach
 15 upon or interfere with the just supremacy of the United States,” violates the Compact Clause,
 16 absent congressional consent. 148 U.S. at 519. This language controls here, assuming *arguendo*
 17 that *Virginia* applies outside the domestic context.

18 Third, legislative practice supports the conclusion that the Agreement runs afoul of the
 19 Compact Clause. To wit, Congress has often addressed itself to compacts between states and
 20 provinces of Canada, many far less momentous, and far more local in nature, than the Agreement
 21 at issue here. *See generally* Duncan B. Hollis, *Elusive Foreign Compact, The*, 73 Mo. L. Rev.
 22 1071, 1076 (Fall 2008) (“Congress has consented to foreign compacts in only four narrowly
 23 defined categories: (a) bridges; (b) fire fighting; (c) highways; and (d) emergency management.”).
 24 In 1949, for example, it gave preliminary consent to the Northeastern Interstate Forest Fire
 25 Protection Compact. *See* Act of Jun. 25, 1949, ch. 246, 63 Stat. 271, 272 (“Subject to the consent
 26 of the Congress of the United States, any province of the Dominion of Canada which is contiguous
 27 with any member state may become a party to this compact by taking such action as its laws and
 28

the laws of the Dominion of Canada may prescribe for ratification.”). Similarly, it approved a compact for the construction of a highway between Minnesota and Manitoba in 1958. *See* Act of Sept. 2, 1958, Pub. L. No. 85-877, § 1, 72 Stat. 1701, 1701. As recently as 2007, Congress approved the International Emergency Management Assistance Memorandum of Understanding, which provides a structure for northeastern states and nearby Canadian provinces to anticipate and respond to disasters and other emergencies. *See* S.J. Res. 13, 110th Cong., Pub. L. No. 110-171, 121 Stat. 2467 (2007). *See also* 33 U.S.C. § 535a (International Bridge Act) (giving preliminary consent to agreements between states and Canadian and Mexican governmental units on an issue of local concern, subject to approval by the Secretary of State).

Congress has also declined to approve the international aspects of a proposed compact intended to protect the Great Lakes. In 1956, the Department of State testified against including Ontario and Quebec in a proposed Great Lakes Basin Compact on the following grounds:

As a matter of principle, the Department would oppose any interstate compact which affects foreign relations unless there is a showing of a specific local situation appropriate for handling by the local authorities. Here there is no such local situation. The matter is of national interest, and clearly involves foreign relations The proposal is for an international compact, not for an interstate compact. This is not the sort of activity which was intended to be covered by the compact provision of the Constitution. Matters of international negotiation and agreement should be under national control as the Constitution contemplates and requires.

The Great Lakes Basin Compact: Hearing on S. 2688 Before the Subcomm. on the Great Lakes Basin of the S. Comm. on Foreign Relations, 84th Cong. 14, 17 (1956) (statement of Willard B. Cowles, Deputy Legal Adviser, Department of State) (SUF ¶ 17). Twelve years later, Congress provided its consent to the Great Lakes Basin Compact, but only with respect to states and explicitly denying consent for the compact to include Canadian provinces as parties to the Compact. *See* Act of Jul. 24, 1968, Pub. L. No. 90-419, 82 Stat. 414, 419.

Congress’s course of conduct and prior judgment that far lesser agreements with Canadian provinces require Congressional approval should be accorded weight. *See Zivotovsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (emphasis deleted) (“In separation-of-powers cases this Court has often ‘put significant weight upon

historical practice.”)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”). Against these precedent, the Agreement unquestionably has all the indicia of a binding compact subject to the clause.

In *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, the Supreme Court identified the indicia of a compact. They are: (1) establishment of a joint organization; (2) mutually dependent action; (3) restriction on unilateral modification or repeal of operative laws; and (4) reciprocal limitations. 472 U.S. 159, 175 (1985). The Agreement easily meets this test. First, not only does it rely on WCI for technical support, *see* Agreement, Art. 12, but it also establishes a “Consultation Committee” to “resolve . . . differences” between the parties, *id.*, Art. 13.⁵ Second, third, and fourth, and as noted extensively above, the Agreement requires the parties to conform their programs to the point where they are knitted into a virtually seamless regulatory apparatus. *See id.*, Art. 4 (requiring the parties to “continue to examine their respective regulations . . . to promote continued harmonization and integration of [their] programs”); *id.* (requiring the parties to take certain steps “where a difference between certain elements of the Parties’ programs is identified”); *id.* (emphasis added) (providing that, although “[a] Party *may* consider making changes to its . . . program[],” “any proposed changes or additions shall be discussed between the Parties”); *id.*, Art. 5 (imposing the same duty of consultation with respect to “any proposed changes” in the “offset components” of a program); *id.*, Art. 6 (providing that “mutual recognition of the Parties’ compliance instruments shall occur”) (SUF ¶¶ 49-54, 65).

The same can be said about the disjunctive factors set forth in *United States Steel*. That case looked to: (1) whether the arrangement “purport[s] to authorize the member States to exercise

⁵See Letter from Robert W. Byrne, Senior Assistant Attorney General, to Peter Krause, Legal Affairs Secretary, Mar. 16, 2017, at 9 (emphasis added) (“Any jurisdiction that wishes to link with the California Program . . . will need to be a member of WCI, Inc. and will use the California-developed infrastructure for the combined Programs.”), available at <https://ww3.arb.ca.gov/cc/capandtrade/linkage/linkage.htm> (Attorney General’s Advice to Governor Concerning Program Linkage) (last visited Dec. 11, 2019) (SUF ¶ 47).

1 any powers they could not exercise in its absence”; (2) whether “each State retains *complete*
2 *freedom* to adopt or reject the rules and regulations of the [joint organization]”; and (3) whether
3 “each State is free to withdraw at any time.” 434 U.S. at 473 (emphasis added). As to the first
4 factor, California cannot credibly argue that, in the absence of the Agreement, it could compel
5 Quebec – as one example among many – to “discuss[]” any proposed changes to its cap-and-trade
6 program before adopting them. Agreement., Art. 4 (emphasis added) (providing that, although
7 “[a] Party *may consider* making changes to its . . . program[],” “any proposed changes . . . *shall be*
8 *discussed* between the Parties”) (SUF ¶ 52). Cf. *International Paper Co. v. Ouellette*, 479 U.S.
9 481, 495 (1986) (precluding states from using their common law to “do indirectly what they could
10 not do directly – regulate the conduct of out-of-state sources”). As to the second factor, the
11 Agreement is premised on the parties having already harmonized their regulatory schemes, and,
12 so long as California remains a party to the Agreement, it is obliged to “discuss[]” with Quebec
13 “any proposed changes” that it “may consider” to its program, Agreement., Art. 4, and to “consult
14 with” Quebec if a “difference between certain elements of the Parties programs is identified,” *id.*
15 (SUF ¶ 52). This is not an example of “complete freedom to adopt or reject the rules and
16 regulations of the [joint organization].” *United States Steel*, 434 U.S. at 473. To be sure, these
17 “rules and regulations” may literally have their provenance in California, or in Quebec, or in WCI,
18 but once they are adopted as the conforming principles of the Agreement, they acquire an obvious
19 stickiness that California cannot disavow – nor would it, if it wants the covered entities that spend
20 billions of dollars for allowances to have confidence in the system it has helped ordain. Finally,
21 although withdrawal from the Agreement is technically possible – except with respect to Article
22 15, regarding confidentiality – such an act is not a credible option, given the billions of dollars in
23 allowances at stake and the covered entities’ blindness as to whose allowances they hold. In any
24 case, the Supreme Court used the disjunctive to lay out the factors in *United States Steel*,
25 connecting them with the word “nor.” Thus, only one of the three factors need apply for the
26 Agreement to qualify as a “Compact” under that case. As the foregoing analysis demonstrates,
27 however, all three apply in this situation.

B. The United States’ decision to withdraw from the Paris Agreement supports the instant action.

Defendants may argue that the United States’ decision to withdraw from the Paris Agreement leaves no foreign policy in the area of GHGs for the Agreement to impair. This is a red herring. It is also demonstrably untrue.

This argument is a red herring (*i.e.*, beside the point) because the federal government does not need to take affirmative acts to occupy a field of foreign relations. The Constitution instead entrusts the federal government with “full and *exclusive* responsibility for the conduct of affairs with foreign sovereignties” *Hines*, 312 U.S. at 63 (bold emphasis added).

This argument is demonstrably untrue because the federal government in fact has taken affirmative steps in the area of GHG regulation and international relations. They just are not the steps that California’s current elected officials claim to prefer. *Cf. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011) (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981)) (“[T]he relevant question for purposes of displacement is ‘whether the field has been occupied, not whether it has been occupied in a particular manner.’”). For example, even after withdrawing from the Paris Agreement, the United States will remain a party to the UNFCCC, and engage with foreign countries on matters related to climate change and GHG emissions in meetings of the parties to that agreement and in other fora. Moreover, the President’s very decision to withdraw from the Paris Agreement constitutes an exercise and implementation of foreign policy. When the President Trump first announced that the United States intended to withdraw from the Agreement on June 1, 2017, he stated that withdrawal was necessary because, among other things, the Agreement: (1) undermined the nation’s economic competitiveness and would cost jobs; (2) set unrealistic targets for reducing GHG emissions while allowing China to increase such emissions until 2030; and (3) would have negligible impact in any event. *SUF* ¶¶ 8-9. Further, on November 4, 2019, when the United States deposited notification of its withdrawal from the Agreement with the United Nations, the Secretary of State stated publicly that:

The U.S. approach incorporates the reality of the global energy mix and uses all energy sources and technologies cleanly and efficiently In international

1 climate discussions, we will continue to offer a realistic and pragmatic model –
 2 backed by a record of real world results – showing innovation and open markets lead
 3 to greater prosperity, fewer emissions, and more secure sources of energy. We will
 4 continue to work with our global partners to enhance resilience to the impacts of
 5 climate change and prepare for and respond to natural disasters. Just as we have in
 the past, the United States will continue to research, innovate, and grow our economy
 while reducing emissions and extending a helping hand to our friends and partners
 around the globe.

6 Michael R. Pompeo, Press Statement, On the U.S. Withdrawal from the Paris Agreement,
 7 available at <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> (last visited
 8 Dec. 11, 2019) (SUF ¶ 12). The policy described by the Secretary of State evinces the United
 9 States’ integrated approach to the environment, the economy, and national security.

10 Even if the Constitution did not allocate “full and exclusive” responsibility for foreign
 11 affairs to the federal government, *Hines*, 312 U.S. at 63, which is not the case, the United States
 12 still would not need to take any particular action in the affirmative to bar states from acting in this
 13 area. Instead, as the Supreme Court recognized in *Arkansas Electric Cooperative Corp. v.*
 14 *Arkansas Public Service Commission*, 461 U.S. 375, 384 (1982) (emphasis original), “a federal
 15 decision to forgo regulation in a given area may imply an authoritative federal determination that
 16 the area is best left *unregulated*, and in that event would have as much pre-emptive force as a
 17 decision *to regulate*.” Thus, even if it were true that United States foreign policy at this time were
 18 no policy on international emission of greenhouse gas emissions—and that is certainly not true,
 19 given the President’s statements and the United States’ continued participation in the UNFCCC—
 20 that still would not empower California to act in this field.

21 CONCLUSION

22 For the foregoing reasons, the undisputed facts are that California is a member of a treaty—
 23 or at least an unauthorized compact—or both—with the Canadian province of Quebec. Because
 24 this is barred by the Constitution, the Court should enter summary judgment in favor of the United
 25 States. The Court should issue a declaration that the Agreement and supporting California law (as
 26 applied) are invalid.

1 Dated: December 11, 2019.

2
3 Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; GAVIN
C. NEWSOM, in his official capacity as
Governor of the State of California; THE
CALIFORNIA AIR RESOURCES BOARD;
MARY D. NICHOLS, in her official
capacities as Chair of the California Air
Resources Board and as Vice Chair and a
board member of the Western Climate
Initiative, Inc.; WESTERN
CLIMATE INITIATIVE, INC.; JARED
BLUMENFELD, in his official capacities as
Secretary for Environmental Protection and
as a board member of the Western Climate
Initiative, Inc.; KIP LIPPER, in his official
capacity as a board member of the Western
Climate Initiative, Inc., and RICHARD
BLOOM, in his official capacity as a board
member of the Western Climate Initiative,
Inc.,

Defendants.

No. 2:19-cv-02142-WBS-EFB

**PLAINTIFF UNITED STATES OF
AMERICA'S STATEMENT OF
UNDISPUTED FACTS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Date: January 13, 2020
Time: 1:30 p.m.
Courtroom: 5 (14th Floor)
Judge: Hon. William B. Shubb

INTRODUCTION

Pursuant to Local Rule 260(a), Plaintiff United States of America (“United States”) respectfully submits this Statement of Undisputed Facts in support of its motion for summary judgment.

As explained in its concurrently filed brief, the United States is entitled to judgment as a matter of law because the Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, on its face, violates the Article I Treaty and Compact Clauses. Consequently, in the view of the United States, none of the facts listed below is material because a genuine dispute over any or all of them would not preclude the entry of judgment in favor of the United States. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The facts nonetheless are listed below because they provide context and serve to illustrate how the Agreement violates the Article I Treaty and Compact Clauses, and because they provide independent grounds for granting summary judgment in favor of the United States.

UNDISPUTED FACTS

| | Facts | Supporting Evidence |
|---|---|---|
| 1 | The United States is a party to the United Nations Framework Convention on Climate Change of 1992 (“UNFCCC”). | Declaration of Rachel E. Iacangelo, Exh. 1—United Nations Framework Convention on Climate Change. |
| 2 | The UNFCCC was ratified by the President with the advice and consent of the Senate. | Iacangelo Decl., Exh. 2—Senate Daily Digest Regarding Treaty Doc. 102-38: “United Nations Framework Convention on Climate Change” at D1316. |
| 3 | The “ultimate objective [of the UNFCCC is]. . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” | Iacangelo Decl., Exh. 1—United Nations Framework Convention on Climate Change at 4 (Art. 2). |

| 1 | Facts | Supporting Evidence |
|----|--|---|
| 2 | 4 Under the UNFCCC, “[a]ll Parties,” including the United States, are obliged to “(b) [f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change [and] (c) [p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors” | <i>Id.</i> at 5 (Art. 4). |
| 12 | 5 In 2015, various Parties to the UNFCCC agreement entered into the Paris Agreement of 2015 (“Paris Accord”). | Iacangelo Decl., Exh. 3—Paris Agreement of 2015 at 3. |
| 14 | 6 Under the Paris Accord, signatories are to announce “nationally determined contributions” of emissions associated with climate change and periodically report on progress. | <i>Id.</i> at 4-5 (Art. 4). |
| 17 | 7 On March 28, 2017, in Executive Order 13,783, President Trump announced that, “[e]ffective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.” | Iacangelo Decl., Exh. 4—Executive Order 13,783: Promoting Energy Independence and Economic Growth (Section 5(c)). |
| 27 | | |
| 28 | | |

| 1 | Facts | Supporting Evidence |
|----|---|---|
| 2 | 8 On June 1, 2017, President Trump concluded that the Paris Accord relating to the emission of greenhouse gases (“GHG”) “disadvantages the United States to the exclusive benefit of other countries, leaving American workers — who I love — and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production.” | Iacangelo Decl., Exh. 5—Statement by President Trump on the Paris Climate Accord on June 1, 2017 at 2. |
| 7 | 9 In the same statement, President Trump explained that the Paris Accord “could cost America as much as 2.7 million lost jobs by 2025, . . . punishes the United States . . . while imposing no meaningful obligations on the world’s leading polluters, . . . [allows] China . . . to increase these emissions by a staggering number of years — 13, . . . [and] makes [India’s] participation contingent on receiving billions and billions and billions of dollars in foreign aid from developed countries[.]” | <i>Id.</i> at 2-3. |
| 14 | 10 President Trump stated that his Administration would “begin negotiations to reenter either the Paris Accord or a really entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers. . . . to negotiate a new deal that protects our country and its taxpayers.” | <i>Id.</i> |
| 18 | 11 On November 4, 2019, the United States submitted formal notification of its withdrawal from the Paris Accord. | Iacangelo Decl., Exh. 6—Notice of United States’ Notification of Withdrawal from the Paris Agreement of 2015. |
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| 1 | Facts | Supporting Evidence |
|----|--|---|
| 2 | <p data-bbox="293 254 935 894">12 On November 4, 2019, Secretary of State Pompeo stated that “The U.S. approach incorporates the reality of the global energy mix and uses all energy sources and technologies cleanly and efficiently In international climate discussions, we will continue to offer a realistic and pragmatic model – backed by a record of real world results – showing innovation and open markets lead to greater prosperity, fewer emissions, and more secure sources of energy. We will continue to work with our global partners to enhance resilience to the impacts of climate change and prepare for and respond to natural disasters. Just as we have in the past, the United States will continue to research, innovate, and grow our economy while reducing emissions and extending a helping hand to our friends and partners around the globe.”</p> | <p data-bbox="992 254 1463 394">Iacangelo Decl., Exh. 7—Statement by Secretary of State Michael Pompeo on the U.S. Withdrawal from the Paris Agreement.</p> |
| 12 | <p data-bbox="293 926 935 1276">13 On June 1, 2017—the same day as President Trump’s announcement of the United States’ intent to withdraw from the Paris Accord—in what California and other signatory states called a direct response to the United States’ intent to withdraw from the Paris Accord, California entered into the United States Climate Alliance, committing to reducing GHG emissions in a manner consistent with the goals of the Paris Accord.</p> | <p data-bbox="992 926 1438 1024">Iacangelo Decl., Exh. 8—Combined California Bilateral and Multilateral Climate Agreements at 12.</p> |
| 18 | <p data-bbox="293 1308 935 1465">14 Just days later, on June 6, 2017, Edmund Brown Jr., then-Governor of California, met in Beijing with China’s President Xi Jinping to discuss environmental issues and climate change.</p> | <p data-bbox="992 1308 1463 1407">Iacangelo Decl., Exh. 9—Xi Jinping and Jerry Brown of California Meet to Discuss Climate Change at 1.</p> |
| 21 | | |
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| 23 | | |
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| 1 | Facts | Supporting Evidence |
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| 2 | 15 The current Governor of California, Gavin Newsom, described then-Governor Brown’s discussion with President Xi Jinping before the World Economic Forum in September 2019 with the following words: “Just a few years ago, Governor Brown, just five days after President Trump announced his intention to pull out of the Paris Accord, Governor Brown pulled out of his driveway, made his way to the airport, flew to Beijing, sat down in the presidential palace with President Xi — not as a head of state, but a head of a state, the State of California — and doubled down on the Paris Accord. That’s California’s leadership. The fifth largest economy in the world, a state that’s not just sitting back pointing fingers. We’re not bystanders, we have agency and we can shape this debate, like all of us, we can shape the future.” | Iacangelo Decl., Exh. 10—Governor Gavin Newsom Delivers Opening Remarks at Climate Week NYC at 2. |
| 13 | 16 California is a party to at least seventy-two active bilateral and multilateral “agreements” with national and subnational foreign and domestic governments relating “to strengthen the global response to the threat of climate change and to promote a healthy and prosperous future for all citizens.” | Iacangelo Decl., Exh. 8—Combined California Bilateral and Multilateral Climate Agreements at 1-15. |
| 18 | 17 In 1956, the Department of State testified against including Ontario and Quebec in a proposed Great Lakes Basin Compact: “As a matter of principle, the Department would oppose any interstate compact which affects foreign relations unless there is a showing of a specific local situation appropriate for handling by the local authorities. Here there is no such local situation. The matter is of national interest, and clearly involves foreign relations The proposal is for an international compact, not for an interstate compact. This is not the sort of activity which was intended to be covered by the compact provision of the Constitution. Matters of international negotiation and agreement should be under national control as the Constitution contemplates and requires.” | Iacangelo Decl., Exh. 11—Testimony of Willard B. Cowles, Deputy Legal Adviser, Department of State at 14, 17. |
| 28 | | |

| 1 | Facts | Supporting Evidence |
|----|--|---------------------------------------|
| 2 | 18 | |
| 3 | In his 2017 State-of-the-State address, | Iacangelo Decl., Exh. 12—Governor |
| 4 | then-Governor Brown, said “[w]e can do | Brown Delivers 2017 State of the |
| 5 | much on our own and we can join with | State Address at 3. |
| 6 | others – other states and provinces and | |
| 7 | even countries, to stop the dangerous rise | |
| 8 | in climate pollution. And we will.” | |
| 9 | 20 | |
| 10 | In 2006, with British Prime Minister Tony | Iacangelo Decl., Exh. 13—Like a |
| 11 | Blair at his side, then-Governor Arnold | Nation State at 1622. |
| 12 | Schwarzenegger declared that California | |
| 13 | was a “nation-state” with its own foreign | |
| 14 | policy. | |
| 15 | 20 | |
| 16 | In 2007, then-Governor Schwarzenegger | Iacangelo Decl., Exh. 14— |
| 17 | stated that California is “the modern | Schwarzenegger: California is ‘Nation |
| 18 | equivalent of the ancient city-states of | State’ Leading World at 1. |
| 19 | Athens and Sparta. California has the | |
| 20 | ideas of Athens and the power of Sparta . . | |
| 21 | . . . Not only can we lead California into the | |
| 22 | future . . . we can show the nation and the | |
| 23 | world how to get there. We can do this | |
| 24 | because we have the economic strength, | |
| 25 | the population, the technological force of a | |
| 26 | nation-state.” | |
| 27 | 21 | |
| 28 | Similarly, on July 25, 2017, during the | Iacangelo Decl., Exh. 15—Governor |
| 29 | signing ceremony for AB 398, a bill | Brown Signs Landmark Climate Bill |
| 30 | extending and modifying the California | to Extend California’s Cap-and-Trade |
| 31 | “cap-and-trade” program, then-Governor | Program at 1. |
| 32 | Brown stated that “[w]e are a nation-state | |
| 33 | in a globalizing world and we’re having an | |
| 34 | impact and you’re here witnessing one of | |
| 35 | the key milestones in turning around this | |
| 36 | carbonized world into a decarbonized, | |
| 37 | sustainable future.” | |
| 38 | 22 | |
| 39 | In response, Kevin De León, the California | <i>Id.</i> at 2. |
| 40 | Senate President pro Tempore, said “the | |
| 41 | world is looking to California. . . . | |
| 42 | Today’s extension of our landmark cap- | |
| 43 | and-trade program, coupled with our | |
| 44 | effective clean energy policies, will move | |
| 45 | us forward into the future and we plan to | |
| 46 | take the rest of the world with us[[]].” | |
| 47 | | |
| 48 | | |

| 1 | Facts | Supporting Evidence |
|----|---|---|
| 2 | 23 The California “cap-and-trade” program is authorized under the 2006 California Global Warming Solutions Act (AB 32), which requires the California Air Resources Board (“CARB”) to “facilitate the development of integrated . . . regional, national, and international greenhouse gas reduction programs.” | CAL. HEALTH & SAFETY CODE § 38564. |
| 6 | 24 In the most recent AB 32 Scoping Plan, CARB stated that “[c]limate change is a global problem. GHGs are global pollutants, unlike criteria air pollutants and toxic air contaminants, which are pollutants of regional and local concern.” | Iacangelo Decl., Exh. 16—Final Environmental Analysis for the Strategy for Achieving California’s 2030 Greenhouse Gas Target, Attachment A: Environmental and Regulatory Setting at 24. |
| 10 | 25 In this same document, CARB stated that “GHGs have long atmospheric lifetimes (one to several thousand years). GHGs persist in the atmosphere for long enough time periods to be dispersed around the globe. . . .” | <i>Id.</i> |
| 14 | 26 In this same document, CARB stated that “[t]he quantity of GHGs in the atmosphere that ultimately result in climate change is not precisely known, but is enormous; no single project alone would measurably contribute to an incremental change in the global average temperature, or to global, local, or micro climates.” | <i>Id.</i> at 25. |
| 18 | 27 Similarly, on October 23, 2019, Governor Newsom, stated that “[c]arbon pollution knows no borders[.]” | Iacangelo Decl., Exh. 17—Governor Newsom Statement on Trump Administration’s Attack on California’s Landmark Cap-and-Trade Program at 1. |
| 21 | 28 After the passage of AB 32, beginning in February 2007, the governors of several states, including California, along with the premiers of several provinces, including Quebec, formed or joined the Western Climate Initiative, the parent of Defendant Western Climate Initiative, Inc., to establish a North American market to regulate GHGs. | Iacangelo Decl., Exh. 18—Design Recommendations for the WCI Regional Cap-and-Trade Program at 3 (introductory letter from “The WCI Partners”). |
| 26 | | |
| 27 | | |
| 28 | | |

| | Facts | Supporting Evidence |
|----|--|-------------------------------------|
| 1 | | |
| 2 | 29 In 2008, Western Climate Initiative | Iacangelo Decl., Exh. 19—Design for |
| 3 | released its design recommendations, and, | the WCI Regional Program at 2. |
| 4 | in 2010, an actual design for a regional | |
| 5 | program. | |
| 6 | 30 The 2010 design promoted a “cap-and- | <i>Id.</i> at 5-6. |
| 7 | trade” framework that would impose an | |
| 8 | aggregate cap on the emission of GHGs. | |
| 9 | 31 The 2010 design called for linkage of | <i>Id.</i> at 22, DD-44. |
| 10 | markets across jurisdictions to, among | |
| 11 | other things, increase liquidity and create | |
| 12 | economies of scale. | |
| 13 | 32 The 2010 design contemplated that smaller | <i>Id.</i> |
| 14 | jurisdictions, like Quebec, would be able to | |
| 15 | link to larger ones, like California, in order | |
| 16 | to stabilize the smaller states’ own systems | |
| 17 | and, in some cases, make them viable. | |
| 18 | 33 In October 2011, pursuant to AB 32, | 17 Cal. Code Regs. (“CCR”) §§ |
| 19 | CARB adopted regulations to establish a | 95801-96022. |
| 20 | cap-and-trade program based on the 2010 | |
| 21 | design that imposes an aggregate cap on | |
| 22 | the emission of GHGs in the State of | |
| 23 | California. | |
| 24 | 34 Through the cap-and-trade program, | <i>Id.</i> § 95820(c). |
| 25 | California sells or grants “allowances,” | |
| 26 | which are regulatory compliance | |
| 27 | instruments that entitle holders thereof to | |
| 28 | emit a specified quantity of GHGs in the | |
| | State of California. | |
| | 35 For each metric ton of CO ₂ or CO ₂ | <i>Id.</i> |
| | equivalent that a covered entity emits into | |
| | the air, it must “surrender” a “compliance | |
| | instrument,” <i>e.g.</i> , an allowance. | |
| | 36 There are two types of compliance | <i>Id.</i> § 95820. |
| | instruments: allowances and “offset | |
| | credits.” | |
| | 37 Covered entities may obtain additional | <i>Id.</i> §§ 95910-95915. |
| | allowances by buying them at periodic | |
| | auctions or from other authorized parties. | |
| | 38 As of September 2019, California reported | Iacangelo Decl., Exh. 20—California |
| | that it had received almost twelve billion | Cap-and-Trade Program: Summary of |
| | dollars in proceeds from the sale of | Proceeds to California and |
| | allowances since 2012. (The specific | Consigning Entities at 1. |
| | figure was \$11,796,013,586.66.). | |

| | Facts | Supporting Evidence |
|----|---|--|
| 1 | | |
| 2 | 39 Covered entities can obtain offset credits | 17 CCR § 95970(a)(1). |
| 3 | by undertaking projects (such as forestry | |
| 4 | projects) designed to remove CO2 from the | |
| 5 | atmosphere. | |
| 6 | 40 Covered entities are permitted to “bank” | <i>Id.</i> § 95922; <i>see also</i> Iacangelo Decl., |
| 7 | instruments, although California restricts | Exh. 21—Facts About Holding Limit |
| 8 | the total number an entity may hold at one | for Linked Cap-and-Trade Programs |
| 9 | time. | at 1. |
| 10 | 41 Covered entities may bank compliance | Iacangelo Decl., Exh. 21—Facts |
| 11 | instruments through 2030. | About Holding Limit for Linked Cap- |
| 12 | | and-Trade Programs at 1. |
| 13 | 42 The California cap-and-trade program | 17 CCR §§ 95920-95923. |
| 14 | allows holders of allowances to buy, sell, | |
| 15 | and make other financial commitments | |
| 16 | related to allowances in a secondary | |
| 17 | market. | |
| 18 | 43 CARB regulations provide for linkage with | <i>Id.</i> § 95940. |
| 19 | other cap-and-trade programs: | |
| 20 | “compliance instrument[s] issued by an | |
| 21 | external greenhouse gas emissions trading | |
| 22 | system . . . may be used to meet” the | |
| 23 | state’s regulatory requirements, provided | |
| 24 | the external system satisfies certain | |
| 25 | criteria. | |
| 26 | 44 CARB also contemplates links between | <i>Id.</i> § 95993; Iacangelo Decl., Exh. |
| 27 | California’s program and initiatives in | 22—California Tropical Forest |
| 28 | developing countries to protect tropical | Standard: Criteria for Assessing |
| | forests. | Jurisdiction-Scale Programs that |
| | | Reduce Emissions from Tropical |
| | | Deforestation at 3-4. |
| | 45 In December 2011, Quebec also adopted | Iacangelo Decl., Exh. 23— |
| | regulations to establish its own cap-and- | Regulation respecting a cap-and-trade |
| | trade program that imposes an aggregate | system for greenhouse gas emission |
| | cap on the emission of GHGs in the | allowances. |
| | Province of Quebec based on the 2010 | |
| | design. | |
| | 46 In November 2011, between these events, | Iacangelo Decl., Exh. 24—Western |
| | Western Climate Initiative formed | Climate Initiative Jurisdictions |
| | Defendant Western Climate Initiative, Inc. | Establish Non-Profit Corporation to |
| | (“WCI”) to facilitate linkage of the | Support Greenhouse Gas Emissions |
| | California and Quebec cap-and-trade | Trading Programs at 1. |
| | programs. | |

| 1 | Facts | Supporting Evidence |
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| 2 | 47 On March 16, 2017, Robert W. Byrne, Senior Assistant Attorney General of California, sent a letter to Peter Krause, Legal Affairs Secretary, stating that “[a]ny jurisdiction that wishes to link with the California Program . . . will need to be a member of WCI, Inc. and will use the California-developed infrastructure for the combined Programs.” | Iacangelo Decl., Exh. 25—Letter from Robert W. Byrne, Senior Assistant Attorney General, to Peter Krause, Legal Affairs Secretary at 9. |
| 7 | 48 In September 2013, California and Quebec signed an “Agreement between the Gouvernement du Québec and the California Air Resources Board concerning the harmonization of cap-and-trade programs for reducing greenhouse gas emissions,” as renegotiated in 2017 and renamed an “Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions” (the “Agreement”). | Iacangelo Decl., Exh. 26—Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions at 2-3. |
| 13 | 49 The Agreement’s purpose is to “harmonize” and “integrate” the California and Quebec cap-and-trade programs in order to reduce GHGs in the “fight against climate change.” | <i>Id.</i> at 1 (Art. 1). |
| 16 | 50 The word “harmonize,” or one of its cognates, appears thirty-seven times in the Agreement. | <i>See id.</i> at 2-13. |
| 18 | 51 The Agreement requires the parties to evaluate their programs on a continuous basis to “promote continued harmonization and integration.” | <i>Id.</i> at 4 (Art. 4). |
| 21 | 52 The Agreement allows a party to “consider making changes to its . . . program,” but provides that “any proposed changes or additions shall be discussed between the Parties.” | <i>Id.</i> at 5 (Art. 4.) |
| 24 | 53 The Agreement provides that, where differences arise between “elements” of the parties’ programs, “the Parties shall determine if such elements need to be harmonized for the proper functioning and integration of the programs. | <i>Id.</i> at 4 (Art. 4). |
| 27 | | |
| 28 | | |

| | Facts | Supporting Evidence |
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| 1 | | |
| 2 | 54 The Agreement states that the parties agree | <i>Id.</i> at 5 (Art. 5). |
| 3 | to consult with each other before making | |
| 4 | changes to the “offset components” of their | |
| 5 | programs. | |
| 6 | 55 The Agreement establishes a mechanism | <i>Id.</i> at 9, 12 (Arts. 13, 20). |
| 7 | for the resolution of differences: “[i]f | |
| 8 | approaches for resolving differences . . . | |
| 9 | cannot be developed in a timely manner | |
| 10 | through staff workgroups, the Parties shall | |
| 11 | constructively engage through the | |
| 12 | Consultation Committee, and if needed | |
| 13 | with additional officials of the Parties, or | |
| 14 | their designees.” | |
| 15 | 56 On technical issues, the parties agree to | <i>Id.</i> at 9 (Art. 12). |
| 16 | rely on Defendant Western Climate | |
| 17 | Initiative because it “was created to | |
| 18 | perform such services.” | |
| 19 | 57 The Agreement provides that “auctioning | <i>Id.</i> at 8 (Art. 9). |
| 20 | of compliance instruments by the Parties’ | |
| 21 | respective programs shall occur jointly.” | |
| 22 | 58 As of August 20, 2019, twenty such | Iacangelo Decl., Exh. 27—Auction |
| 23 | auctions had taken place under the | Notices and Reports at 1-6. |
| 24 | Agreement and its predecessor. | |
| 25 | 59 In joint auctions, allowances are sold in | Iacangelo Decl., Exh. 28—Detailed |
| 26 | lots of 1000, divided to reflect California’s | Auction Requirements and |
| 27 | and Quebec’s relative contribution. | Instructions at pt. IX, p. 43 (see Table |
| 28 | | of Contents). |
| | 60 In its guidance titled “Detailed Auction | <i>Id.</i> |
| | Requirements and Instructions,” CARB | |
| | states that, if a joint auction “included 60 | |
| | percent California 2019 vintage allowances | |
| | and 40 percent Québec 2019 vintage | |
| | allowances, each bid lot . . . would include | |
| | 600 California 2019 vintage allowances | |
| | and 400 Québec 2019 vintage allowances.” | |
| | 61 Allowance buyers do not know the exact | Iacangelo Decl., Exh. 29—Chapter 5: |
| | mix of the allowances that they purchase | How Do I Buy, Sell, and Trade |
| | because “serial numbers are not available | Compliance Instruments? at 28. |
| | to account holders.” | |
| | 62 Trades between allowance holders are | Iacangelo Decl., Exh. 30—Welcome |
| | facilitated through the Compliance | to WCI CITSS at 1. |
| | Instrument Tracking System Service, | |
| | which is operated by CARB and monitors | |
| | accounts and compliance. | |

| | Facts | Supporting Evidence |
|----|---|--------------------------------------|
| 1 | | |
| 2 | 63 Purchases in the joint auction are currently | Iacangelo Decl., Exh. 31—California |
| 3 | settled through Deutsche Bank. | Cap-and-Trade Program, Cap-and- |
| 4 | | Trade Auctions and Reserve Sales |
| 5 | 64 Under the Agreement, covered entities in | Financial Services Administration at |
| 6 | California are authorized to trade | 1. |
| 7 | compliance instruments with covered | Iacangelo Decl., Exh. 26—Agreement |
| 8 | entities in Quebec, and vice-versa, “as | on the Harmonization and Integration |
| 9 | provided for under [the parties’] respective | of Cap-and-Trade Programs for |
| 10 | cap-and-trade program regulations.” | Reducing Greenhouse Gas Emissions |
| 11 | | at 7 (Art. 7). |
| 12 | 65 Under the Agreement, California agrees to | |
| 13 | accept compliance instruments issued by | <i>Id.</i> at 6 (Art. 6). |
| 14 | Quebec to satisfy its regulatory | |
| 15 | requirements, and Quebec agrees to | |
| 16 | reciprocate. | |
| 17 | 66 The word “shall” appears over fifty times | <i>See id.</i> at 2-13. |
| 18 | in the Agreement; the phrase “the parties | |
| 19 | shall” appears twenty times in the | |
| 20 | Agreement. | |
| 21 | 67 Termination of the Agreement requires | <i>Id.</i> at 13 (Art. 22). |
| 22 | unanimous consent of the parties and is not | |
| 23 | legally effective until “12 months after the | |
| 24 | last of the Parties has provided is consent | |
| 25 | to the other Parties.” | |
| 26 | 68 In the event of either withdrawal or | <i>Id.</i> at 11 (Art. 17). |
| 27 | termination, a party’s “obligations under | |
| 28 | article regarding confidentiality of | |
| | information . . . continue to remain in | |
| | effect.” | |
| | 69 The Agreement provides that other | <i>Id.</i> at 11 (Art. 19). |
| | jurisdictions that wish to reduce GHG | |
| | emissions “may be added as a Party to the | |
| | Agreement if the candidate Party has | |
| | adopted a program that is harmonized and | |
| | can be integrated with each of the Parties’ | |
| | programs,” and all parties agree to the | |
| | accession to the Agreement. | |
| | 70 Ontario was briefly a party to the | Iacangelo Decl., Exh. 32—Linkage |
| | Agreement but withdrew in July 2018. | California Cap-and-Trade Program: |
| | | Facts About the Linked Cap-and- |
| | | Trade Programs at 1-2; Iacangelo |
| | | Decl., Exh. 33—“Linkage” at 1; |
| | | Iacangelo Decl., Exh. 34—Archived |
| | | – Cap and trade. |

Facts

Supporting Evidence

71 Notwithstanding Ontario's departure from
the Agreement, California determined that
Ontario allowances "held in California
covered entity, opt-in covered entity, and
general market participant accounts . . .
remain valid for compliance and trading
purposes."

17 CCR § 95943(a)(2).

Dated: December 11, 2019.

Respectfully submitted,

/s/ Paul E. Salamanca
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; GAVIN
C. NEWSOM, in his official capacity as
Governor of the State of California; THE
CALIFORNIA AIR RESOURCES BOARD;
MARY D. NICHOLS, in her official
capacities as Chair of the California Air
Resources Board and as Vice Chair and a
board member of the Western Climate
Initiative, Inc.; WESTERN
CLIMATE INITIATIVE, INC.; JARED
BLUMENFELD, in his official capacities as
Secretary for Environmental Protection and as
a board member of the Western Climate
Initiative, Inc.; KIP LIPPER, in his official
capacity as a board member of the Western
Climate Initiative, Inc., and RICHARD
BLOOM, in his official capacity as a board
member of the Western Climate Initiative,
Inc.,

Defendants.

) No. 2:19-cv-02142-WBS-EFB

)
)
) **DECLARATION OF RACHEL E.**
) **IACANGELO IN SUPPORT OF UNITED**
) **STATES' MOTION FOR SUMMARY**
) **JUDGMENT**

) Date: January 13, 2020
) Time: 1:30 p.m.
) Courtroom: 5 (14th Floor)
) Judge: Hon. William B. Shubb

I, Rachel E. Iacangelo, declare as follows:

1 1. Since September 3, 2019, I have been employed by the Environment and Natural
2 Resources Division of the United States Department of Justice. I have worked for the Department
3 of Justice in Washington, D.C. as a paralegal specialist since September 3, 2019.

4 2. I submit this declaration at the request of counsel for the United States in the above-
5 captioned matter in support of the United States' motion for summary judgment.

6 3. Attached hereto, as Exhibit 1, is a true and correct copy of the text of the treaty
7 entitled "United Nations Framework Convention on Climate Change," ratified by the President
8 with the advice and consent of the Senate. This document is available at [https://unfccc.int/resource](https://unfccc.int/resource/docs/convkp/conveng.pdf)
9 /docs/convkp/conveng.pdf (last visited Dec. 11, 2019).

10 4. Attached hereto, as Exhibit 2, is a true and correct copy of the Senate Daily Digest
11 recognizing approval of Treaty Doc. 102-38: "United Nations Framework Convention on Climate
12 Change."

13 5. Attached hereto, as Exhibit 3, is a true and correct copy of the Paris Agreement of
14 2015. This document is available at: [http://unfccc.int/files/essential_background/convention/](http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf)
15 application/pdf/english_paris_agreement.pdf (last visited Dec. 11, 2019).

16 6. Attached hereto, as Exhibit 4, is a true and correct copy of Executive Order 13,783,
17 entitled Promoting Energy Independence and Economic Growth and published in the Federal
18 Register on March 28, 2017. This document is available at [https://www.govinfo.gov/content/pkg](https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf)
19 /FR-2017-03-31/pdf/2017-06576.pdf (last visited Dec. 11, 2019).

20 7. Attached hereto, as Exhibit 5, is a true and correct copy of the Statement by
21 President Trump on the Paris Climate Accord on June 1, 2017. This document is available at
22 [https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-](https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/)
23 accord/ (last visited Dec. 11, 2019).

24 8. Attached hereto, as Exhibit 6, is a true and correct copy of the notice distributed by
25 the Secretary-General of the United Nations of the United States' notification of withdrawal from
26 the Paris Agreement of 2015. This document is available at [https://treaties.un.org/doc/](https://treaties.un.org/doc/Publication/CN/2019/CN.575.2019-Eng.pdf)
27 Publication/CN/2019/CN.575.2019-Eng.pdf (last visited Dec. 11, 2019).

1 9. Attached hereto, as Exhibit 7, is a true and correct copy of the press statement by
2 Michael R. Pompeo entitled “On the U.S. Withdrawal from the Paris Agreement” and dated
3 November 4, 2019. This document is available at [https://www.state.gov/on-the-u-s-withdrawal-](https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement)
4 [from-the-paris-agreement](https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement) (last visited Dec. 11, 2019).

5 10. Attached hereto, as Exhibit 8, is a true and correct copy of a pdf combining the
6 bilateral and multilateral agreements hosted on California government website describing
7 “Climate Change Partnerships.” The source for this document is available at [https://www.](https://www.climatechange.ca.gov/climate_action_team/partnerships.html)
8 [climatechange.ca.gov/climate_action_team/partnerships.html](https://www.climatechange.ca.gov/climate_action_team/partnerships.html) (last visited Dec. 11, 2019).

9 11. Attached hereto, as Exhibit 9, is a true and correct copy of an article authored by
10 Javier C. Hernández and Chris Buckley, entitled “Xi Jinping and Jerry Brown of California Meet
11 to Discuss Climate Change,” and published on the New York Times’ website. This article is
12 available at [https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown-califo-](https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown-california-climate.html)
13 [rnia-climate.html](https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown-california-climate.html) (last visited Dec. 11, 2019).

14 12. Attached hereto, as Exhibit 10, is a true and correct copy of a pdf of a press release
15 published by the Office of the Governor of California entitled “Governor Gavin Newsom Delivers
16 Opening Remarks at Climate Week NYC.” This document is available at [https://www.gov.ca.gov](https://www.gov.ca.gov/2019/09/23/governor-gavin-newsom-delivers-opening-remarks-at-climate-week-nyc/)
17 [/2019/09/23/governor-gavin-newsom-delivers-opening-remarks-at-climate-week-nyc/](https://www.gov.ca.gov/2019/09/23/governor-gavin-newsom-delivers-opening-remarks-at-climate-week-nyc/) (last
18 visited Dec. 11, 2019).

19 13. Attached hereto, as Exhibit 11, is a true and correct copy of the testimony of Willard
20 B. Cowles, Deputy Legal Adviser, Department of State, concerning the Great Lakes Basin
21 Compact provided during a hearing in 1956 before the Subcommittee on the Great Lakes Basin,
22 Committee on Foreign Relations.

23 14. Attached hereto, as Exhibit 12, is a true and correct copy of a pdf of a press release
24 published by the Office of the Governor of California (archived records of Governor Edmund G.
25 Brown Jr.) entitled “Governor Brown Delivers 2017 State of the State Address.” This document
26 is available at <https://www.ca.gov/archive/gov39/2017/01/24/news19669/index.html> (last visited
27 Dec. 11, 2019).

1 15. Attached hereto, as Exhibit 13, is a true and correct copy of a law review article
2 authored by Douglas A. Kysar and Bernadette A. Meyler, entitled “Like a Nation State,” and
3 published in 2008 in the University of California at Los Angeles Law Review.

4 16. Attached hereto, as Exhibit 14, is a true and correct copy of an article authored by
5 Adam Tanner, entitled “Schwarzenegger: California is ‘Nation State’ Leading World,” and
6 published on the Washington Post’s website. This article is available at
7 <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/09/AR2007010901427.html>
8 (last visited Dec. 11, 2019).

9 17. Attached hereto, as Exhibit 15, is a true and correct copy of a pdf of a press release
10 published by the Office of the Governor of California (archived records of Governor Edmund G.
11 Brown Jr.) entitled “Governor Brown Signs Landmark Climate Bill to Extend California’s Cap-
12 and-Trade Program.” This document is available at [https://www.ca.gov/archive/gov39/2017](https://www.ca.gov/archive/gov39/2017/07/25/news19891/index.html)
13 [/07/25/news19891/index.html](https://www.ca.gov/archive/gov39/2017/07/25/news19891/index.html) (last visited Dec. 11, 2019).

14 18. Attached hereto, as Exhibit 16, is a true and correct copy of “Final Environmental
15 Analysis for the Strategy for Achieving California’s 2030 Greenhouse Gas Target” dated
16 November 2017. This document is available at [https://ww3.arb.ca.gov/cc/scopingplan/](https://ww3.arb.ca.gov/cc/scopingplan/2030sp_appf_finalea.pdf)
17 [2030sp_appf_finalea.pdf](https://ww3.arb.ca.gov/cc/scopingplan/2030sp_appf_finalea.pdf) (last visited Dec. 11, 2019). This document is Appendix F to the 2017
18 California Scoping Plan, which is available at [https://ww3.arb.ca.gov/cc/scopingplan/scoping](https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf)
19 [_plan_2017.pdf](https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf) (last visited Dec. 11, 2019).

20 19. Attached hereto, as Exhibit 17, is a true and correct copy of a pdf of a press release
21 published by the Office of the Governor of California entitled “Governor Newsom Statement on
22 Trump Administration’s Attack on California’s Landmark Cap-and-Trade Program.” This
23 document is available at [https://www.gov.ca.gov/2019/10/23/governor-newsom-statement-on-](https://www.gov.ca.gov/2019/10/23/governor-newsom-statement-on-trump-administrations-attack-on-californias-landmark-cap-and-trade-program/)
24 [trump-administrations-attack-on-californias-landmark-cap-and-trade-program/](https://www.gov.ca.gov/2019/10/23/governor-newsom-statement-on-trump-administrations-attack-on-californias-landmark-cap-and-trade-program/) (last visited Dec.
25 11, 2019).

26 20. Attached hereto, as Exhibit 18, is a true and correct copy of a document published
27 by the Western Climate Initiative entitled “Design Recommendations for the WCI Regional Cap-
28

1 and-Trade Program” and dated September 23, 2008 (corrected on March 13, 2009). This document
2 is available at <http://www.environnement.gouv.qc.ca/changements/carbone/documents-WCI/mod>
3 [ele-recommande-WCI-en.pdf](http://www.environnement.gouv.qc.ca/changements/carbone/documents-WCI/mod) (last visited Dec. 11, 2019).

4 21. Attached hereto, as Exhibit 19, is a true and correct copy of a document published
5 by the Western Climate Initiative and entitled “Design for the WCI Regional Program” and dated
6 July 2010. This document is available at <http://www.environnement.gouv.qc.ca/changements/>
7 [carbone/documents-WCI/cadre-mise-en-oeuvre-WCI-en.pdf](http://www.environnement.gouv.qc.ca/changements/) (last visited Dec. 11, 2019).

8 22. Attached hereto, as Exhibit 20, is a true and correct copy of a document published
9 by the California Air Resources Board (CARB) entitled “California Cap-and-Trade Program:
10 Summary of Proceeds to California and Consigning Entities,” updated in September 2019. This
11 document is available at https://ww3.arb.ca.gov/cc/capandtrade/auction/proceeds_summary.pdf
12 (last visited Dec. 11, 2019).

13 23. Attached hereto, as Exhibit 21, is a true and correct copy of a document published
14 by CARB entitled “Facts About Holding Limit for Linked Cap-and-Trade Programs,” updated in
15 September 2018. This document is available at <https://www.arb.ca.gov/cc/capandtrade/>
16 [holding_limit.pdf](https://www.arb.ca.gov/cc/capandtrade/) (last visited Dec. 11, 2019).

17 24. Attached hereto, as Exhibit 22, is a true and correct copy of a document published
18 by CARB entitled “California Tropical Forest Standard: Criteria for Assessing Jurisdiction-Scale
19 Programs that Reduce Emissions from Tropical Deforestation.” This document is available at
20 https://ww3.arb.ca.gov/cc/ghgsectors/tropicalforests/ca_tropical_forest_standard_english.pdf
21 (last visited Dec. 11, 2019).

22 25. Attached hereto, as Exhibit 23, is a true and correct copy of Quebec’s “Regulation
23 respecting a cap-and-trade system for greenhouse gas emission allowances,” updated to
24 November 1, 2019. This document is available at <http://legisquebec.gouv.qc.ca/en/pdf/cr/Q-2,%>
25 [20R.%2046.1.pdf](http://legisquebec.gouv.qc.ca/en/pdf/cr/Q-2,%) (last visited Dec. 11, 2019).

26 26. Attached hereto, as Exhibit 24, is a true and correct copy of a pdf of a news release
27 entitled “Western Climate Initiative Jurisdictions Establish Non-Profit Corporation to Support
28

1 Greenhouse Gas Emissions Trading Programs,” published by the Western Climate Initiative on its
2 website. This document is available at [http://westernclimateinitiative.org/index.php?option=com_](http://westernclimateinitiative.org/index.php?option=com_content&view=category&layout=blog&id=6&Itemid=6)
3 [content&view=category&layout=blog&id=6&Itemid=6](http://westernclimateinitiative.org/index.php?option=com_content&view=category&layout=blog&id=6&Itemid=6) (last visited Dec. 11, 2019).

4 27. Attached hereto, as Exhibit 25, is a true and correct copy of a letter from Robert W.
5 Byrne, Senior Assistant Attorney General, to Peter Krause, Legal Affairs Secretary, dated March
6 16, 2017. This document is available at [https://ww3.arb.ca.gov/cc/capandtrade/linkage/ag_letter](https://ww3.arb.ca.gov/cc/capandtrade/linkage/ag_letter_sb_1018.pdf)
7 [_sb_1018.pdf](https://ww3.arb.ca.gov/cc/capandtrade/linkage/ag_letter_sb_1018.pdf).

8 28. Attached hereto, as Exhibit 26, is a true and correct copy of the Agreement on the
9 Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas
10 Emissions, as renegotiated in 2017. This document is available at [https://ww3.arb.ca.gov/cc/cap](https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf)
11 [andtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf](https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf) (last visited Dec. 11, 2019).

12 29. Attached hereto, as Exhibit 27, is a true and correct copy of a pdf of a webpage
13 published by CARB entitled “Auction Notices and Reports.” This document is available at
14 https://ww3.arb.ca.gov/cc/capandtrade/auction/auction_notices_and_reports.htm (last visited
15 Dec. 11, 2019).

16 30. Attached hereto, as Exhibit 28, is a true and correct copy of a document published
17 by CARB entitled “Detailed Auction Requirements and Instructions,” updated on September 20,
18 2019. This document is available at [https://ww3.arb.ca.gov/cc/capandtrade/auction/auction_](https://ww3.arb.ca.gov/cc/capandtrade/auction/auction_requirements.pdf)
19 [requirements.pdf](https://ww3.arb.ca.gov/cc/capandtrade/auction/auction_requirements.pdf) (last visited Dec. 11, 2019).

20 31. Attached hereto, as Exhibit 29, is a true and correct copy of a chapter of a guidance
21 document published by CARB; the chapter is entitled “Chapter 5: How Do I Buy, Sell, and Trade
22 Compliance Instruments?” This document is available at [https://ww3.arb.ca.gov/cc/capandtrade/](https://ww3.arb.ca.gov/cc/capandtrade/guidance/chapter5.pdf)
23 [guidance/chapter5.pdf](https://ww3.arb.ca.gov/cc/capandtrade/guidance/chapter5.pdf) (last visited Dec. 11, 2019).

24 32. Attached hereto, as Exhibit 30, is a true and correct copy of a pdf of the information
25 published by the Western Climate Initiative, Inc., on a webpage entitled “Welcome to WCI
26 CITSS.” This document is available at <https://www.wci-citss.org/> (last visited Dec. 11, 2019).

33. Attached hereto, as Exhibit 31, is a true and correct copy of a document published by CARB entitled “California Cap-and-Trade Program, Cap-and-Trade Auctions and Reserve Sales Financial Services Administration,” updated December 2, 2019. This document is available at https://ww3.arb.ca.gov/cc/capandtrade/auction/forms/financial_services_administration_faq.pdf (last visited Dec. 11, 2019).

34. Attached hereto, as Exhibit 32, is a true and correct copy of a document published by CARB entitled “California Cap-and-Trade Program: Facts About the Linked Cap-and-Trade Programs,” updated December 1, 2017. This document is available at https://ww3.arb.ca.gov/cc/capandtrade/linkage/linkage_fact_sheet.pdf (last visited Dec. 11, 2019).

35. Attached hereto, as Exhibit 33, is a true and correct copy of a pdf of the information published by CARB on a public webpage entitled “Linkage.” This document is available at <https://ww3.arb.ca.gov/cc/capandtrade/linkage/linkage.htm> (last visited Dec. 11, 2019).

36. Attached hereto, as Exhibit 34, is a true and correct copy of a pdf of a webpage published by a former government of Ontario entitled “Archived – Cap and trade.” This document is available at <https://www.ontario.ca/page/cap-and-trade> (last visited Dec. 11, 2019).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 11, 2019.

/s/ Rachel E. Iacangelo
Rachel E. Iacangelo

INDEX OF EXHIBITS

1. United Nations Framework Convention on Climate Change
2. Senate Daily Digest Regarding Treaty Doc. 102-38: “United Nations Framework Convention on Climate Change”
3. Paris Agreement of 2015
4. Executive Order 13,783: Promoting Energy Independence and Economic Growth
5. Statement by President Trump on the Paris Climate Accord on June 1, 2017
6. Notice of United States’ Notification of Withdrawal from the Paris Agreement of 2015
7. Statement by Secretary of State Michael Pompeo on the U.S. Withdrawal from the Paris Agreement
8. Combined California Bilateral and Multilateral Climate Agreements
9. Xi Jinping and Jerry Brown of California Meet to Discuss Climate Change
10. Governor Gavin Newsom Delivers Opening Remarks at Climate Week NYC
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- 1 21. Facts About Holding Limit for Linked Cap-and-Trade Programs
- 2 22. California Tropical Forest Standard: Criteria for Assessing Jurisdiction-Scale Programs
- 3 that Reduce Emissions from Tropical Deforestation
- 4 23. Regulation respecting a cap-and-trade system for greenhouse gas emission allowances
- 5 24. Western Climate Initiative Jurisdictions Establish Non-Profit Corporation to Support
- 6 Greenhouse Gas Emissions Trading Programs
- 7 25. Letter from Robert W. Byrne, Senior Assistant Attorney General, to Peter Krause, Legal
- 8 Affairs Secretary
- 9 26. Agreement on the Harmonization and Integration of Cap-and-Trade Programs for
- 10 Reducing Greenhouse Gas Emissions
- 11 27. Auction Notices and Reports
- 12 28. Detailed Auction Requirements and Instructions
- 13 29. Chapter 5: How Do I Buy, Sell, and Trade Compliance Instruments?
- 14 30. Welcome to WCI CITSS
- 15 31. California Cap-and-Trade Program, Cap-and-Trade Auctions and Reserve Sales Financial
- 16 Services Administration
- 17 32. Linkage California Cap-and-Trade Program: Facts About the Linked Cap-and-Trade
- 18 Programs
- 19 33. "Linkage"
- 20 34. Archived – Cap and trade

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Washington, D.C. 20530

Attorneys for the United States

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; GAVIN
C. NEWSOM, in his official capacity as
Governor of the State of California; THE
CALIFORNIA AIR RESOURCES BOARD;
MARY D. NICHOLS, in her official
capacities as Chair of the California Air
Resources Board and as Vice Chair and a
board member of the Western Climate
Initiative, Inc.; WESTERN
CLIMATE INITIATIVE, INC.; JARED
BLUMENFELD, in his official capacities as
Secretary for Environmental Protection and
as a board member of the Western Climate
Initiative, Inc.; KIP LIPPER, in his official
capacity as a board member of the Western
Climate Initiative, Inc., and RICHARD
BLOOM, in his official capacity as a board
member of the Western Climate Initiative,
Inc.,

Defendants.

No. 2:19-cv-02142-WBS-EFB

**NOTICE OF LODGING OF EXHIBITS
SUPPORTING THE UNITED STATES'
MOTION FOR SUMMARY JUDGMENT**

NOTICE OF LODGING OF EXHIBITS SUPPORTING THE UNITED STATES'
MOTION FOR SUMMARY JUDGMENT

On December 11, 2019, the United States filed a Notice of Motion, Motion for Summary Judgment, and Brief in Support Thereof. At the direction of the Court and pursuant to Local Rule 138(b) and the Court's standard information document, and in light of the number of pages in question, the United States hereby lodges a copy of the Declaration of Rachel Iacangelo and supporting exhibits in the above-captioned action on a flash drive. The declaration and exhibits are compiled into a single PDF, and the exhibits are described in an index appended to this notice. The flash drive is being mailed to the Court by counsel for the United States.

Dated: December 11, 2019.

Respectfully submitted,

/s/ Paul E. Salamanca
JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney
General
PAUL E. SALAMANCA
R. JUSTIN SMITH
PETER J. MCVEIGH
STEVEN W. BARNETT
Attorneys
Environment & Natural Resources
Division
U.S. Department of Justice

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33. "Linkage"
34. Archived – Cap and trade

CERTIFICATE OF SERVICE

On this 11th day of December, 2019, this NOTICE OF LODGING OF EXHIBITS SUPPORTING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT was served on counsel of record with an accompanying copy of the flash drive referenced in this notice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 11th day of December, 2019.

/s/ Paul E. Salamanca
JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney
General
PAUL E. SALAMANCA
R. JUSTIN SMITH
PETER J. MCVEIGH
STEVEN W. BARNETT
Attorneys
Environment & Natural Resources
Division
U.S. Department of Justice

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; GAVIN
C. NEWSOM, in his official capacity as
Governor of the State of California; THE
CALIFORNIA AIR RESOURCES BOARD;
MARY D. NICHOLS, in her official
capacities as Chair of the California Air
Resources Board and as Vice Chair and a
board member of the Western Climate
Initiative, Inc.; WESTERN
CLIMATE INITIATIVE, INC.; JARED
BLUMENFELD, in his official capacities as
Secretary for Environmental Protection and as
a board member of the Western Climate
Initiative, Inc.; KIP LIPPER, in his official
capacity as a board member of the Western
Climate Initiative, Inc., and RICHARD
BLOOM, in his official capacity as a board
member of the Western Climate Initiative, Inc.,

Defendants.

No. 2:19-cv-02142-WBS-EFB

**[PROPOSED] ORDER GRANTING THE
UNITED STATES' MOTION FOR
SUMMARY JUDGMENT**

Date: January 13, 2020
Time: 1:30 p.m.
Courtroom: 5 (14th Floor)
Judge: Hon. William B. Shubb

Having considered the United States' Motion for Summary Judgment, including
the United States' Memorandum of Law and the Defendants' opposition thereto, it is
hereby ordered pursuant to Federal Rule of Civil Procedure 56(a) that summary judgment
is GRANTED. The Court hereby FINDS and DECLARES, pursuant to 28 U.S.C. §
2201(a), that the Agreement on the Harmonization and Integration of Cap-and-Trade
Programs for Reducing Greenhouse Gas Emissions of 2017 between the State of
California and the Canadian province of Quebec, and supporting California law as applied
(including but not limited to CAL. HEALTH & SAFETY CODE § 38564 and 17 CCR §§ 95940-

1 43), are inconsistent with the Treaty Clause of the Constitution, Article I, sec. 10, cl. 1,
2 and the Compact Clause of the Constitution, Article 1, sec. 10, cl. 3.
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5 Ordered on this ____ day of _____ 2020.
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9 _____
10 The Honorable William B. Shubb
11 Senior United States District Judge
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